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EDITOR'S NOTE

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o. 83-1362-CFX
tatus: GRANTED

Title: Cleveland Board of Education, Petitioner
v.
James Loudermill, et al.

cketed:
ebruary 14, 1984

Court: United States Court of Appeals for the Sixth Circuit

ies:
83-1363
83-6392

Counsel for petitioner: Wymar, James S.

Counsel for respondent: Fertel, Robert M.

Entry	Date	Note	Proceedings and Orders
1	Feb 14 1984	P	Petition for writ of certiorari filed.
2	Mar 7 1984		Brief of respondent James Loudermill in opposition filed.
3	Mar 7 1984	J	Motion of respondent James Loudermill for leave to proceed in forma pauperis filed.
4	Mar 14 1984		Brief amicus curiae of Ohio, et al. filed. VIDED.
5	Apr 11 1984		DISTRIBUTED. April 27, 1984
6	May 4 1984		REDISTRIBUTED. May 10, 1984
12	May 11 1984		REDISTRIBUTED. May 17, 1984
13	May 11 1984		REDISTRIBUTED. May 17, 1984
14	May 21 1984		Motion of respondent James Loudermill for leave to proceed in forma pauperis GRANTED.
15	May 21 1984		Petition GRANTED. The case is consolicated with 83-1363 and 83-6392 and a total of one hour is allotted for oral argument.
16	Jun 11 1984	J	Motion of James Loudermill for appointment of counsel filed.
18	Jun 11 1984		Order extending time to file brief of petitioner on the merits until July 19, 1984.
21	Jun 11 1984		Order extending time to file brief of respondent on the merits until August 20, 1984.
22	Jun 15 1984		DISTRIBUTED. June 21, 1984. (Motion of James Loudermill for appointment of counsel).
24	Jun 22 1984		REDISTRIBUTED. June 28, 1984. (MOTION OF JAMES LOUDERMILL FOR APPOINTMENT OF COUNSEL).
29	Jul 2 1984		Motion of James Loudermill for appointment of counsel GRANTED, and it is ordered that Robert M. Fertel, esquire, of Cleveland, Ohio, is appointed pursuant to Rule 46.6 to serve as counsel for James Loudermill in these cases.
27	Jul 6 1984		Order further extending time to file brief of petitioner on the merits until July 30, 1984.
29	Jul 12 1984		brief amicus curiae of Ohio, et al. filed. VIDED.
30	Jul 19 1984		brief amicus curiae of Natl. School Boards Assn. filed. VIDED.
33	Jul 25 1984		brief of petitioner Cleveland Bd. of Ed. filed.
31	Jul 27 1984		Joint appendix filed. VIDED.
32	Aug 13 1984		Record filed.
33	Aug 10 1984		Certified appendix & C.A. proceedings received.
34	Jul 30 1984		brief amicus curiae of American Civil Liberties Union of

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No. 83-1362-CFX

Entry	Date	Note	Proceedings and Orders
			Cleveland filed. VIDED.
38	Aug 12 1984	D	Motion of petitioner in No. 83-1362 for divided argument filed.
39	Aug 15 1984	D	Motion of petitioner in No. 83-1363 for divided argument filed.
37	Aug 29 1984		Brief of respondents James Loudermill and Richard Donnelly filed. VIDED.
38	Aug 29 1984		Brief amicus curiae of American Fed. of State, County & Municipal Employees filed. VIDED.
39	Aug 29 1984		Brief amicus curiae of National Education Association filed. VIDED.
40	Sep 19 1984		Motion of petitioner in No. 83-1362 for divided argument GRANTED.
41	Sep 19 1984		Motion of petitioner in No. 83-1363 for divided argument GRANTED.
42	Oct 11 1984		CIRCULATED.
43	Oct 22 1984		SET FOR ARGUMENT, Monday, Dec. 3, 1984. This case is consolidated with Nos. 83-1363, 6392. (1st case)(1hour).
44	Nov 8 1984	D	Motion of City Respondents in No. 83-6392 for correction of caption and for divided argument filed.
45	Nov 26 1984		Motion of City Respondents in No. 83-6392 for correction of caption and for divided argument GRANTED.
46	Dec 3 1984		ARGUED.

PETITION FOR WRIT OF CERTIORARI

83-1362

No.

Office - Supreme Court, U.S.
FILED
FEB 14 1984
ALEXANDER L. STEVAS
CLERK

Supreme Court of the United States

October Term, 1983

THE CLEVELAND BOARD OF EDUCATION,
Petitioner,

vs.

JAMES LOUDERMILL,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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February 14, 1984

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0607

QUESTION PRESENTED

Is a pre-termination hearing required when a civil service employee is found to have lied on his application form and state statutes provide an adequate and constitutionally acceptable post-termination process as required by the Fourteenth Amendment to the United States Constitution?

PARTIES

The Plaintiff-Appellant in the proceeding in the Court of Appeals was James Loudermill. The Defendants-Appellees in the Court of Appeals were the Cleveland Board of Education (John Gallagher, President), the City of Cleveland (George Voinovich, Mayor), the Cleveland Civil Service Commission (Thomas R. Skulina, President), and William J. Brown (Attorney General of the State of Ohio). The Attorney General was named in the complaint, but none of the allegations pertained to the State of Ohio, no relief was sought against the State of Ohio, and the State of Ohio did not participate in the proceedings before the Court of Appeals.

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No.

Supreme Court of the United States

October Term, 1983

THE CLEVELAND BOARD OF EDUCATION,
Petitioner,

vs.

JAMES LOUDERMILL,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The Cleveland Board of Education petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment entered by that court against it.

OPINIONS BELOW

On November 6, 1981, U. S. District Judge John M. Manos issued an opinion and an order dismissing James D. Loudermill's application to proceed *in forma pauperis*. (Appendix, *infra*, A34-A49.)

On February 22, 1982, Judge Manos issued another opinion and order denying Loudermill's motion to alter or amend his previous judgment. (Appendix, *infra*, A50-A62.)

On November 17, 1983, the United States Court of Appeals for the Sixth Circuit issued a decision* affirming in part and vacating and remanding in part the opinion and order of the United States District Court. (Appendix, *infra*, A1-A33.)

JURISDICTIONAL STATEMENT

This petition seeks review of a decision of the United States Court of Appeals for the Sixth Circuit entered on November 17, 1983. The present petition was filed with this Court within ninety days of that date.

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution states, in pertinent part, as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

2. Ohio Revised Code §124.34 states, in pertinent part, as follows:

> Tenure of office; reduction, suspension, and removal; appeal

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*This decision was recommended for full-text publication pursuant to Sixth Circuit Rule 24. As of the date of this Petition the decision has not been published.

> The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services, or the commission, or any other acts of misfeasance, malfeasance, or nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute a violation of Chapter 102 of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal.
>
> In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.
>
> Within ten days following the filing of such order, the employee may file an appeal, in writing, with the

state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.

STATEMENT OF THE CASE

Respondent filed a complaint in the United States District Court for the Northern District of Ohio seeking to proceed *in forma pauperis*. The District Court, *sua sponte*, issued an order denying leave to proceed *in forma pauperis* and dismissing the complaint with prejudice for failure to state a claim upon which relief could be granted. The District Court determined that Respondent's claim that Ohio Revised Code §124.34 deprived him of procedural due process was without merit, and further determined that the delay in Respondent's post-termination statutory appeals did not constitute a violation of his due process rights.

Respondent appealed to the United States Court of Appeals for the Sixth Circuit. Said Court affirmed the District Court's dismissal of Respondent's complaint which

alleged that the delay in his post-termination hearings violated his due process rights, but vacated and remanded for further consideration the District Court's judgment that dismissed the pre-termination procedural due process claims. The Court of Appeals indicated that Respondent could seek to prove that he sustained damages stemming from the State's failure to provide any pre-termination due process.

This petition asks this Court to review the Court of Appeals' judgment reversing and remanding the District Court's order dismissing Respondent's claim of damages stemming from the fact that no pre-termination hearing was held in the instant case.

FACTS

The facts in the instant case are uncontroverted. Respondent was employed as a security guard by a private firm in 1979, which was under contract to provide security guards for the Petitioner Cleveland City School District. Some time in 1979, said firm declared bankruptcy and Respondent applied for a similar position with the Cleveland City School District itself.

On or about September 25, 1979, Respondent's application for employment was accepted by the Cleveland Board of Education, and he began to work as a security guard immediately thereafter. On his application, Respondent was asked the following question:

"Have you ever been convicted of a crime (felony)?" Respondent answered:

"No."

At the end of the application there is the following paragraph:

"I certify that all the statements made by me in this application are true, complete and correct to the best of my knowledge and that I am aware that any false statements will be sufficient cause for dismissal from or refusal of an appointment for any position with the Cleveland Board of Education."

On September 1, 1980, Respondent was transferred from his position as a security guard to the newly created department of Safety and Security. Pursuant to this transfer, a routine examination of Respondent's employment records was conducted and revealed that he had been convicted of a felony (burglary of an inhabited dwelling and grand larceny) in 1968.

Upon confirming this fact through a check of the records of the Common Pleas Court of Cuyahoga County, Ohio, the Cleveland School Board, on November 3, 1980, sent Mr. Loudermill a letter terminating him from his employment. The Board of Education, at its meeting of November 13, 1980, adopted Resolution No. 551-80 affirming Respondent's termination.

On November 12, 1980, Respondent filed a Notice of Appeal with the Cleveland Civil Service Commission. On January 29, 1981, a hearing was held before a referee of that Commission. Thereafter, on or about April 1, 1981, the referee filed his findings and recommendation. On July 20, 1981, a hearing on Respondent's claim was conducted before the full Cleveland Civil Service Commission which orally announced that it would affirm Respondent's dismissal from employment. On August 10, 1981, the Commission approved Proposed Findings of Fact and Conclusions of Law upholding the termination of Respondent. Respondent failed to file or perfect any appeal to the Cuyahoga County Court of Common Pleas, as provided by Ohio Revised Code §124.34, and his termination is therefore valid and final.

REASONS FOR GRANTING REVIEW

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS CONTRARY TO UNITED STATES SUPREME COURT PRECEDENT.

Petitioner urges that the decision of the United States Court of Appeals for the Sixth Circuit is contrary to prior opinions of this Court, and this Court should grant certiorari to correct this contradiction.

Comparing the facts of the instant case to those of *Arnett v. Kennedy*, 416 U.S. 134 (1974), the Court will find that the procedures afforded Loudermill under Ohio Civil Service laws were substantially equivalent to those afforded federal employee Arnett. The Court in *Arnett*, *supra*, upheld the constitutionality of the federal statute involved therein.

In *Arnett*, *supra*, a plurality of the Court ruled that an evidentiary hearing is not required to terminate federal Civil Service employees. Although the *Arnett*, *supra*, decision is complex in its plurality, it nonetheless is contrary to the *Loudermill* holding that a pre-termination hearing is constitutionality required. Given that *Loudermill* is contrary to Supreme Court precedent set in *Arnett*, Petitioner urges this Court to grant certiorari.

There is further conflict as illustrated by the case of *Boehning v. Indiana State Employee Association*, 423 U.S. 6 (1975) (*per curiam*), in which this Court ruled that a pre-termination hearing is only required when state statute calls for such a hearing. Fn, at 7. Boehning, like Loudermill, was a Civil Service employee who was terminated without a pre-termination hearing. While the

Court remanded the case back to the state courts for its interpretation of the applicable state statute as to the necessity of a pre-termination hearing, in the instant case it is clear that Ohio law requires no pre-termination hearing. *See*, Ohio Revised Code §124.34, and *Parfitt v. Columbus Correctional Facility*, 62 Ohio St. 2d 434, 406 N.E.2d 521 (1980). Given that *Loudermill* is contrary to the Supreme Court precedent set in *Boehning*, *supra*, Petitioner urges this Court to grant certiorari.

In determining whether or not the due process standards provided by the Constitution have been met, this Court has consistently analyzed the governmental and private interests involved. *See*, *Matheus v. Eldridge*, 424 U.S. 319. *See also*, *Frumpkin v. Board of Trustees, Kent State University*, 626 F.2d 19 (6th Cir. 1980). The Court, in *Matheus*, *supra*, stated:

> "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See, e.g. Goldberg v. Kelly*, *supra*, at 263-271." *Matheus*, *supra*, at 334-335.

The purpose of this test and, indeed, the provisions of the Constitution regarding due process, is to ensure that wrong decisions (in this case a termination) are not made and that justice and truth prevail.

The state's interest in the *Loudermill* case was obviously great in removing an employee from a position which threatened the school community's safety. On the other hand, the employee's interest was his job, which was protected by the appeal procedures implemented in Ohio's Civil Service laws, O.R.C. §124.34. In balancing the state's immediate concern with removing the breach within its security force against an employee's right which could be protected by a post-termination hearing, the outcome shows that no pre-termination hearing was necessary under *Matheus*. Because *Loudermill* has ignored *Matheus* in its ruling, it has acted contrary to Supreme Court precedent. Therefore, certiorari should be granted to review these contrary actions.

Further, in *Matheus* this Court upheld a state's right to terminate disability benefits under Social Security without a pre-deprivation hearing. The Court reasoned that the risk of erroneous deprivation was minimal because the determination was basically medical in nature and was easily documented.

In the *Loudermill* case the employee was an ex-felon who had indicated otherwise on his job application and now was in a position to affect and arguably endanger the security of the pupils and employees of the Cleveland Public Schools. The fact that Respondent lied was proven by an official court document. The risk of error was minimal.

Finally, this Court in *Parratt v. Taylor*, 451 U.S. 527 (1980), specifically stated:

> "Our past cases mandate that some kind of hearing is required at some time before a state finally deprives a person of his property interest. The fundamental requirement of due process is the opportunity

to be heard, and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). However, as many of the above cases recognize, we have rejected the proposition that 'at a meaningful time and in a meaningful manner' *always* [emphasis is the Court's] requires the State to provide a hearing prior to the initial deprivation of property." *Parratt*, *supra*, at 540.

Petitioner urges that the opinion of the United States Court of Appeals for the Sixth Circuit is contrary to the holdings of this Court in *Parratt*, *supra*, and that certiorari be granted in the instant case.

The United States Court of Appeals for the Sixth Circuit instead relied upon *Vitek v. Jones*, 445 U.S. 480 (1980), which involved a liberty interest, not a property interest. Petitioner argues that this reliance is misapplied and is in direct contradiction to the Court's holdings in *Arnett*, *supra*, and *Parratt*, *supra*.

This Court has repeatedly ruled that there is no mandate that there be a pre-termination hearing. Given this Court's rulings, the *Loudermill* opinion is definitely contrary to previous United States Supreme Court rulings. Therefore, Petitioner urges that the decision of the United States Court of Appeals for the Sixth Circuit, vis a vis the facts of the instant case, is contrary to Supreme Court precedent.

II. THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT'S ANALYSIS OF A PRE-TERMINATION HEARING REQUIREMENT UNDER DUE PROCESS WITHOUT FIRST ESTABLISHING A PROPERTY RIGHT IS CONTRARY TO SUPREME COURT PRECEDENT.

Because Loudermill has no property interest to protect, a due process analysis by the Sixth Circuit was neither necessary nor appropriate. The requirements of procedural due process apply only after a party first demonstrates the existence of a property right. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70 (1972). This ruling is logical since without a property right nothing exists to be protected by procedural due process. However, Loudermill has never contested the termination itself, only the method by which he was terminated. If the termination was legitimate, as Loudermill has admitted and the Ohio Civil Service has found, then no property right existed for the Sixth Circuit to protect. More simply put, Loudermill has conceded that he has no right to the job, so he has no property right to trigger a due process analysis.

This argument that the non-existence of a property right negates the necessity of a due process analysis is further exemplified by the ruling of *Bishop v. Wood*, 426 U.S. 341 (1976). In *Bishop* this Court ruled that a property right is not determined by constitutional means, but by reference to state law, and that without such a referential basis, no due process is required. Bishop, like Loudermill, was terminated pursuant to Civil Service laws without a pre-termination hearing. Bishop's §1983 claim was denied since no property right was granted by state law. The Ohio Civil Service Commission determined that

Loudermill was rightfully terminated, thereby indicating that no Ohio law exists by which Loudermill may claim a property right. Therefore, like Bishop, Loudermill's §1983 claim is baseless, and the Sixth Circuit ruling is contrary to this Court's precedent set in *Bishop*.

III. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS CONTRARY TO THE RULING OF THE OHIO SUPREME COURT IN THE CASE OF PARFITT v. COLUMBUS CORRECTIONAL FACILITY.

The *Loudermill* ruling is directly contradictory to the ruling of the Ohio Supreme Court. Certiorari should be granted in order to clarify the conflict between the Sixth Circuit and the Ohio Supreme Court on the issue of pre-termination hearings. In a case with almost exactly the same fact pattern, *Parfitt v. Columbus Correctional Facility*, 62 Ohio St. 2d 434, 406 N.E.2d 521, the Ohio Supreme Court, in an opinion by Chief Justice Celebrezze, ruled that no pre-termination is constitutionally required in cases involving the termination of Civil Service employees. The Chief Justice based his opinion on this Court's ruling of *Arnett v. Kennedy*, 416 U.S. 134 (1974), which he interpreted to require no pre-termination hearing. While the federal courts are not bound by this Ohio ruling, it does raise an interpretational dispute of such significance that this petition should be granted.

IV. THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT OPINION IS IN CONFLICT WITH THE OPINIONS OF OTHER CIRCUIT COURTS.

This Court should grant the instant petition because the *Loudermill* case is contrary to the opinions of other circuit courts. The Fifth Circuit has ruled that no pre-termination hearing is necessary to terminate Fourteenth Amendment rights when a post-termination hearing will preserve these rights. *Jackson v. Stinchcomb*, 635 F.2d 462 (5th Cir. 1981). In the instant case, a post-termination hearing determined whether Loudermill should keep his property right (his job), just as Ohio Civil Service laws have directed since the laws' inception. Because the Sixth Circuit's opinion in *Loudermill* would automatically require a pre-termination hearing, it requires more than the Fifth Circuit ruling and thus is in conflict with said opinion.

Additionally, the bench for the Seventh Circuit has ruled in the case of *Cierchon v. City of Chicago*, 634 F.2d 1055 (7th Cir. 1980), that civil service employees need not be given a pre-termination hearing to constitutionally terminate them. The facts of the instant case are directly analogous to those of *Cierchon*. Because of the inconsistencies among Fifth, Sixth and Seventh Circuits, the Supreme Court should grant certiorari and settle the apparent conflict of authority.

V. THE ISSUE PRESENTED BY THE INSTANT CASE IS NEARLY IDENTICAL TO THE ISSUE ON WHICH THIS COURT GRANTED CERTIORARI IN DAVIS v. SCHERER, CASE NO. 83-490 (DECEMBER 12, 1983).

The *Loudermill* case involves the constitutionality of the pre-termination and post-termination procedures applicable to public employees covered by the Civil Service laws of the state of Ohio.

Recently this Court granted certiorari to consider the constitutionality of similar pre-termination and post-termination procedures for Florida Civil Service employees. *Scherer v. Davis*, 523 F. Supp. 4 (N.D. Florida 1981), *affirmed without opinion*, 710 F.2d 838 (11th Cir. 1983), *cert. granted sub nom. Davis v. Scherer*, Case No. 83-490, 52 U.S.L.W. 3449 (December 12, 1983).

The Ohio procedures reviewed by the Court of Appeals in the instant case are similar to those involved in the *Davis* case. Ohio Revised Code §124.34 actually provides for more procedural safeguards to discharge employees than the procedures as set up by Florida law. Further, as indicated above, there is no factual issue as to the appropriateness of Loudermill's discharge.

Since greater procedural protections were afforded Loudermill in the instant case, this Court's decision in the *Davis* case would have a direct and substantial impact upon the decision of the United States Court of Appeals for the Sixth Circuit. Because of this potential impact, the Supreme Court should grant Petitioner's request for certiorari.

CONCLUSION

Petitioner respectfully urges that this Court grant the petition and issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment that court entered against it.

Respectfully submitted,

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APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed November 17, 1983)

Nos. 82-3227, 82-3226

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES LOUDERMILL,
Plaintiff-Appellant,

v.

CLEVELAND BOARD OF EDUCATION, *et al.*,
Defendants-Appellees.

RICHARD DONNELLY,
Plaintiff-Appellant,

v.

PARMA BOARD OF EDUCATION, *et al.*,
Defendants-Appellees.

ON APPEAL from the United States District Court
for the Northern District of Ohio,
Eastern Division.

Before: MERRITT, WELLFORD and TIMBERS,* Circuit Judges.

TIMBERS, Circuit Judge, delivered the opinion of the Court, in which MERRITT, Circuit Judge, joined. WELLFORD,

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*Of the Second Circuit, by designation.

Circuit Judge, (pp. 28-30) filed a separate opinion concurring in part, dissenting in part.

[2] TIMBERS, Circuit Judge. Appellants James Loudermill and Richard Donnelly, both classified civil service employees under Ohio Rev. Code Ann. § 124.34 (Page 1978), commenced the instant civil rights actions after being discharged by their municipal employers.[1] In challenging the propriety of their respective discharges, the two employees alleged that their employers' failure to afford them an opportunity before dismissal to present evidence on their own behalf, as well as a prompt post-termination hearing, violated their rights to procedural due process under the Fourteenth Amendment. The District Court for the Northern District of Ohio, John M. Manos, District Judge, held that neither Fourteenth Amendment allegation raised a cognizable claim, i.e., that no pre-termination process was due and that the delay in the post-termination hearings was not excessive. Appellees urge that we affirm on the basis of the district court's analysis. Alternatively, appellee Cleveland Civil Service Commission urges us not to reach the merits of Loudermill's claim because of his failure to exhaust state remedies, and appellee Parma Civil Service Commission urges that Donnelly's action is barred by res judicata.

For the reasons stated below, we hold that the exhaustion and res judicata claims do not preclude us from reach-

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1. Included as appellees in Loudermill's action are the Cleveland Board of Education and its president, John Gallagher; the City of Cleveland and its Mayor, George Voinovich; the Cleveland Civil Service Commission and its president, Thomas R. Skulina; and Ohio's Attorney General, William J. Brown. Included as appellees in Donnelly's action are the Parma Board of Education and its president, Robert Kosciolny; the city of Parma and its Mayor, John Petruska; the Parma Civil Service Commission and its chairman, Leo Hepner; and two of its members, Ralph Schell and Donald Narus.

ing the merits of these appeals. With respect to the post-termination due process claims, we agree with the district court that the delays in granting the post-termination hearings did not rise to constitutional violations. With respect to the pre-termination [3] due process claims, however, we hold that, because of the statutory protections afforded civil service employees under § 124.34, a municipality must provide its employees some opportunity to present evidence on their own behalf prior to discharge. Accordingly, we affirm in part, and vacate and remand in part for further proceedings.

I.

LOUDERMILL ACTION (No. 82-3227)

Loudermill was employed as a security guard by a private firm that supplied guards to the Cleveland Board of Education. After the private firm declared bankruptcy in 1979, many of the guards, including Loudermill, applied for similar positions with the Board of Education. As part of the application, applicants were asked, "Have you ever been convicted of a crime (felony)?" Loudermill responded "No". At the end of his application, he signed the following certification:

> "I certify that all the statements made by me in this application are true, complete and correct to the best of my knowledge and that I am aware that any false statements will be sufficient cause for dismissal from or refusal of an appointment for any position with the Cleveland Board of Education."

The Board of Education accepted Loudermill's application on September 25, 1979. He commenced work immediately thereafter. As a classified civil service employee under § 124.34, he could be discharged only for "cause".

In the event of discharge, the statute required that a trial board be appointed to hear any appeal within thirty days.[2]

[4] After a year of employment, the Board of Education transferred Loudermill to a position with the newly created Department of Safety and Security. A routine examination of all transferees' employment records revealed that Loudermill had been convicted of a felony in 1968.

By a letter dated November 3, 1980, the Business Manager of the Board of Education advised Loudermill

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2. Ohio Rev. Code Ann. § 124.34 in relevant part provides:

"The tenure of every officer or employee in the classified service of the state and the counties . . . holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty . . . or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office. . . .

In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.

Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officers or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code. . . ."

that he was being dismissed. The letter explained that the discharge stemmed from his dishonesty in filling out the employment application. He claims that, if he had been afforded an opportunity to respond to the charges before dismissal, he could have presented a meritorious defense to demonstrate his honesty, namely, that, because of the particular circumstances surrounding his 1968 conviction, he believed that he had been adjudged guilty of a misdemeanor rather than a felony.

[5] Loudermill filed a notice of appeal with the Cleveland Civil Service Commission on November 12, 1980. The next day, the Board of Education adopted a resolution officially approving his discharge.

In late January 1981, Loudermill appeared for a hearing before the Cleveland Civil Service Commission. A referee appointed by the Commission, in a report filed April 1, 1981, recommended that Loudermill be reinstated. Without further testimony, the Civil Service Commission rejected the referee's recommendation on July 20, 1981, and affirmed Loudermill's discharge.

In October 1981, Loudermill commenced the instant action under 42 U.S.C. § 1983 (1976 & Supp. IV 1980), seeking monetary, injunctive, and declaratory relief. He alleged that appellees' failure to afford him a pre-termination hearing or an opportunity to respond to the dishonesty charge violated his due process rights to liberty and property. He sought damages and a declaration that § 124.34 was constitutionally invalid for failing to provide an opportunity for classified civil service employees to respond to charges prior to removal. Further, Loudermill alleged that the inordinate delay before his post-termination hearing likewise violated his due process rights. Finally, he sought a mandatory injunction ordering his reinstatement with full backpay.

The district court dismissed Loudermill's action for failure to state a claim upon which relief could be granted. It held that, while Loudermill, under § 124.34, enjoyed a cognizable property interest in continuing employment, due process did not require a pre-termination hearing. The court also held that, since the delay in granting the post-termination hearing was not excessive, the Civil Service Commission's conduct did not violate due process. The court denied a subsequent motion to alter or amend the judgment.

[6] DONNELLY ACTION (No. 82-3226)

Donnelly was employed as a bus mechanic by the Parma Board of Education. He enjoyed the same status as Loudermill under Ohio law, i.e., he was a classified civil service employee who could be terminated only for cause under § 124.34. The Board discharged Donnelly on August 17, 1977 because of his failure to pass an eye examination. The Board previously afforded Donnelly an opportunity to retake the eye examination, but it had not provided him with an opportunity to challenge the discharge. Donnelly claims that, if he had been afforded an opportunity to inform the Board that it still employed another bus mechanic who had failed the eye examination, the Board might have reevaluated the efficacy of the eye examination requirement, have scrutinized more closely the purported reasons for discharging Donnelly, and might not have proceeded with the discharge.

Donnelly filed a notice of appeal with the Parma Civil Service Commission on August 31, 1977. The Commission declined to hold a hearing on the ground that the appeal was untimely, the notice of appeal not having been filed within the ten day period prescribed by § 124.34. Note 2 *supra*. Donnelly argued that the statutory period under Ohio law did not begin to run until the Commission actually

received the termination notice (September 9, 1977). Donnelly commenced an action seeking a writ of mandamus in the Cuyahoga County Court of Common Pleas to compel the Commission to commence the hearing. On May 9, 1978, the parties agreed to a writ of mandamus requiring that the Commission hold a hearing within the ensuing thirty day period. After a full evidentiary hearing held on May 30, 1978, the Commission ordered Donnelly reinstated, but made no provision for the award of backpay.[3]

[7] Rather than filing an appeal pursuant to § 124.34, Donnelly commenced an action in the Cuyahoga County Court of Common Pleas seeking damages and backpay from the effective date of his discharge to the time of the Commission's reinstatement order. Donnelly predicated the action on state law claims and alleged deprivation of Fourteenth Amendment rights.

Without opinion, the Court of Common Pleas dismissed the complaint on February 2, 1979. The Cuyahoga County Court of Appeals affirmed on February 22, 1980, on the ground that Donnelly had failed to file an appeal from the Commission's decision in the manner prescribed by § 124.34. Donnelly's petition to the Ohio Supreme Court for review was denied on September 26, 1980.

More than a year later, on October 27, 1981, Donnelly commenced the instant action, alleging denial of due process and equal protection guaranteed under the Fourteenth Amendment.[4] The district court dismissed the complaint

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3. Apparently the Civil Service Commission does not have the power to award backpay. *Hannan v. City of Cleveland*, No. 41348 (Ohio Ct. App. 1980); *City of Cleveland v. Doman*, No. 41192 (Ohio Ct. App. 1980); *see State ex rel. Martin v. City of Columbus*, 58 Ohio St. 2d 281, 284, 389 N.E.2d 1123, 1125 (1979).

4. Like Loudermill, he predicated his claims on both 42 U.S.C. § 1983 and the Fourteenth Amendment. For convenience we shall refer to both sets of claims as § 1983 actions.

sua sponte, holding that, pursuant to its opinion in *Loudermill*, Donnelly had not stated a claim upon which relief could be granted. Donnelly filed a timely notice of appeal. His appeal was consolidated with that in *Loudermill* for the purposes of oral argument and this opinion.

II.

We turn first to the question whether appellants' failure to exhaust state judicial remedies requires us to dismiss their procedural due process claims. Neither Loudermill nor Donnelly followed the procedure established under Ohio law for appealing adverse administrative determinations. Pursuant to § 124.34, "either the appointing authority or the officers or employee may appeal from the decision . . . of the commission [8] to the court of common pleas of the county in which the employee resides in accordance with the procedures provided by section 119.12 of the Revised Code."

Section 119.12 in relevant part provides:

> "Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of his appeal. A copy of such notice of appeal shall also be filed by appellant with the court. Unless otherwise provided by law relating to a particular agency, such notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section."

Instead of filing notices of appeal, Loudermill commenced this action in the federal court; Donnelly sought damages in the state court after the fifteen day period for filing a notice of appeal had expired. Arguably, if appellants had pursued their appeals properly in the state court as provided in § 124.34, they could have obtained the relief they sought. If we were to require a litigant to exhaust

state judicial remedies before instituting a § 1983 action, we might well dismiss the instant appeals.

The Supreme Court, however, made it clear long ago that there is no state judicial exhaustion requirement in § 1983 cases. For example, in *McNeese v. Board of Education*, 373 U.S. 668 (1963), the Court held that a § 1983 claim could not "be defeated because relief was not first sought under state law which provided a remedy." *Id.* at 671. The Court explained that "[w]e would defeat [the underlying purposes of § 1983] if we held that assertion of a federal claim in federal court must await an attempt to vindicate the same claim in a state court." *Id.* at 672.

In rejecting a more recent argument favoring an exhaustion requirement, the Court in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), emphasized that "exhaustion of state administrative remedies should not be required as a prerequisite to [9] bringing an action pursuant to § 1983. We decline to overturn our prior decisions holding that such exhaustion is not required." *Id.* at 516. By refusing to require exhaustion of even administrative remedies, the Court in *Patsy* left little room for a judicial exhaustion requirement.[5] Indeed, if there were such a

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5. We note that the *Patsy* decision is not easily reconcilable with the Court's earlier decision in *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981), where the Court left open the possibility of exceptions to the no-exhaustion requirement. *See The Supreme Court, 1981 Term*, 96 Harv. L. Rev. 62, 207-17 (1982). While we believe that *Patsy* has not precluded the possibility of fashioning future exceptions to the no-exhaustion rule, we find that such an exception would be inappropriate in the instant cases where appellants exhausted their administrative remedies. The Court has never even intimated that exhaustion of state judicial remedies in § 1983 cases should be required, as it is in habeas corpus cases. Nor do we believe that the instant actions fall within the range of exceptions contemplated by Justice Brennan in his concurrence in *Fair Assessment*. *Id.* at 133-37 (Brennan, J., concurring) (federal courts should require exhaustion of state remedies when congressional intent to require exhaustion can be fairly understood from the pertinent legislation).

requirement, then principles of res judicata and collateral estoppel would bar almost all access to federal courts in § 1983 actions, a result plainly at odds with congressional intent. *Patsy, supra*, 457 U.S. at 502-12,[6] *Allen v. McCurry*, 449 U.S. 90, 99-101 (1980). Plaintiffs seeking to vindicate their constitutional rights, whether substantive or procedural in nature, *United Church of the Medical Center v. Medical Center Commission*, 689 F.2d 693, 697-98 (7th Cir. 1982), cannot be deprived of the opportunity to proceed in the federal courts.

III.

Although resort to a state judicial forum may not be a prerequisite to a § 1983 action, appellee Parma Board of Education argues that, once Donnelly invoked the state judicial [10] process and lost, he was barred thereafter from relitigating the underlying claims in any court. In the state court action, Donnelly unquestionably raised claims similar to those asserted in the instant federal court action. He alleged that the lack of a pre-termination hearing violated his due process rights and that the discharge itself violated his equal protection rights.[7] The

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6. If § 1983 actions were treated similarly to habeas corpus actions, then the problems of preclusion would disappear. In light of the legislative history of § 1983, however, such a change would have to originate with Congress.

7. Donnelly's amended complaint in the state court in relevant part alleges:

> "18. The Plaintiff was denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution by the Defendants when he was not given any notice of the availability of any administrative procedures or the proper procedures to exercise his rights thereto after he was given notice of his termination of employment with the Defendant Parma City School District.
>
> 19. The Plaintiff was denied equal protection of the law as guaranteed by the Fourteenth Amendment to the United

(Continued on following page)

question therefore is whether the state court's dismissal of the complaint precludes the instant action under the doctrine of res judicata—sometimes referred to as claim preclusion.

Before we may proceed with the res judicata issue, we must decide whether state or federal law determines the preclusive effect of the prior Ohio court action. We begin by examining the full faith and credit statute, 28 U.S.C. § 1738 (1976), which in relevant part provides:

[11] "....

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States....
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Footnote continued—

> States Constitution by the Defendants Parma City School District when he was terminated from his employment because he could not pass an eye examination while another mechanic who also could not pass an eye examination was not terminated from his employment.
>
> 20. The Plaintiff was denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution when he was not given an opportunity by the Defendants prior to his termination of employment to state his objections thereto before said termination of employment became effective.
>
> 21. The Plaintiff was denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution by the Defendants when he was not afforded to a full evidentiary hearing prior to his termination of employment with the Defendant Parma City School District."

The statute imposes on us the obligation to give state court judgments the same effect as they have in the state in which they were rendered. If the statute applies to the instant civil rights action, state law would control our resolution of the res judicata question.

The Supreme Court in *Allen v. McCurry*, *supra*, held that § 1738 governs § 1983 actions and therefore may require federal courts to give a state court judgment preclusive effect, at least on grounds of collateral estoppel or issue preclusion. Despite the special federal interest in providing a forum for civil rights cases, *e.g.*, *Lombard v. Board of Education*, 502 F.2d 631, 635-37 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975), § 1983 does not give federal courts a license to federalize the doctrine of issue preclusion. *Allen*, *supra*, 449 U.S. at 103-05. The Court reviewed the legislative history of § 1983 and concluded that "the history of § 1983 does not in any way suggest that Congress intended to repeal or restrict the traditional doctrine of preclusion," *id.* at 98, and that "much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits." *Id.* at 99. Although the Court's reasoning appears to have equal force if applied to claim preclusion, the Court restricted its decision to the collateral estoppel effects of prior state court decisions. *Id.* at 94 n.5.

In the Title VII setting, the Court recently extended the [12] *Allen* reasoning to encompass claim preclusion. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). Kremer had filed discrimination charges with the E.E.O.C. which referred him to the New York State Division of Human Rights. Upon an adverse determination by the state agency, Kremer petitioned for review in the Appellate Division, First Department of the New York Supreme Court. That court affirmed the agency's determination under an "arbitrary or capricious" standard. The United States Supreme Court ultimately sustained the dismissal of Kremer's subsequent Title VII action on res judiciata grounds. While the Court recognized that the state court did not give de novo review to Kremer's discrimination claim, it held that limited review of the agency's determination sufficed for purposes of claim preclusion.

Upon holding that Title VII did not repeal or modify § 1738, the Court in *Kremer* applied state law to determine the preclusive effect of the state court judgment. Under state law, affirmance of a state administrative decision precluded further state litigation involving the claims that were the subject of the administrative decison. The federal court, therefore, was bound by § 1738 to respect the prior state court judgment. According to the Court in *Kremer*, reliance on § 1738 was "strongly suggested if not compelled by [its] recent decision in *Allen v. McCurry* that preclusion rules apply in 42 U.S.C. § 1983 actions and may bar federal courts from freshly deciding constitutional claims previously litigated in state court." *Id.* at 476.

We construe *Allen* and *Kremer* to compel application of traditional principles of claim preclusion in the § 1983 context, as indeed our Court's precedents suggest. *Castorr v. Brundage*, 674 F.2d 531, 536-37 (6th Cir.), *cert. denied* ____ U.S. ____, (1982); *Coogan v. Cincinnati Bar Association*, 431 F.2d 1209, 1211 (6th Cir. 1970). Applied to the instant case, *Allen* and *Kremer* suggest that we scrutinize Ohio law to assess the preclusive effect it would attach to the [13] state law dismissal of Donnelly's claims. If Ohio courts would hold that the prior determinations preclude any further litigation under principles of res judicata, then we are bound to affirm the dismissal of Donnelly's claims.

As in most jurisdictions, the doctrine of res judicata in Ohio bars the relitigation of those claims on which there has been a final judgment on the merits. *Norwood v. McDonald*, 142 Ohio St. 299, 305, 52 N.E.2d 67, 71 (1943); *see Federal Deposit Insurance Corp. v. Eckhardt*, 691 F.2d 245, 247 (6th Cir. 1982). Ohio rules which determine whether a dismissal should be treated as "on the merits" track the codified Federal Rule.[8] Ohio R. Civ. P. 41(b)(4) provides in relevant part that "A dismissal for lack of jurisdiction over the person or subject matter . . . shall operate as a failure otherwise than on the merits." All other dismissals are to be considered with prejudice, even if the trial court does not so specify. In the instant case, although the state trial court which originally dismissed the action did not articulate the grounds for its decision, the state appellate court based its decision on Donnelly's failure to meet the requirements of Ohio Rev. Code Ann. § 119.12 to perfect his appeal from the administrative adjudication.[9] The Cuyahoga County Court of Appeals held that:

> [14] "Donnelly failed to seek judicial review of the Commission's July 25, 1978 decision. Instead, he instituted an independent proceeding in the Common Pleas Court of Cuyahoga County on October 5, 1978. This action was not permissible.
>
> The first assignment of error is not well taken.
>
> In view of the disposition of the first assignment of error, it is unnecessary to address the remaining assignments of error."

8. Fed. R. Civ. P. 41(b) in relevant part provides:

> "INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . .
>
> If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal other than for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

9. Donnelly also claims that the court's failure to entertain an independent action for damages was plain error. It is well settled, however, that an erroneous decision, so long as it is on the merits, still bars subsequent actions. Restatement (Second) of Judgments § 19 comment a (1982).

We now must decide whether Ohio considers dismissal for failure to comply with § 119.12 to be a dismissal on the merits. Appellee Parma Board of Education presumably would characterize the fifteen day statutory limit for appealing from the Commission's decision as a statute of limitations.[10] While dismissal on statute of limitations grounds does not necessarily carry preclusive effect under Fed. R. Civ. P. 41(b), *compare Henson v. Columbus Bank & Trust Co.*, 651 F.2d 320, 324-25 (5th Cir. 1981), with *Sack v. Low*, 478 F.2d 360 (2d Cir. 1973), it is clear that Ohio treats such dismissals as "on the merits". In *LaBarbera v. Batsch*, 19 Ohio St. 2d 106, 227 N.E.2d 55 (1967), the Ohio Supreme Court held that a judgment based upon a statute of limitations bars further actions arising from the same claims. The court reasoned that "[S]tatutes of limitation are . . . designed to assure an end to litigation and to establish a state of stability and repose." *Id.* at 114, 227 N.E.2d at 62. Thus, considering dismissal on statute of limitations grounds as being "on the merits" furthers the res judicata aims of repose and finality.

To be sure, the Cuyahoga County Court of Appeals dismissed Donnelly's action because it was time barred.

10. Appellee without analysis assumed that the state adjudication was "on the merits". It did analogize, however, to our decision in *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978), which involved the res judicata effect of a dismissal on statute of limitations grounds.

Yet Ohio, like other jurisdictions, distinguishes between statutes [15] of limitations and provisions for perfecting appeals. While a statute of limitations protects litigants from the possibility of vexatious repetition of suits and hence may be viewed as a defense on the merits, requirements to perfect an appeal reflect institutional limitations on the power of a court. The Court of Common Pleas in Ohio, although a trial court, is a court of limited jurisdiction. Ohio Const. art. IV, § 1. To obtain review of an administrative decision, the aggrieved litigant must rely on specific statutory mandates such as those provided by §§ 124.34 and 119.12. Those sections detail the steps which litigants must follow to perfect an appeal from a state administrative tribunal and thereby invoke the jurisdiction of the court. *Kearns v. Sherrill*, 63 Ohio App. 533, 537-39, 27 N.E.2d 407, 410-11 (analyzing precursors to §§ 124.34 and 119.12), *aff'd*, 137 Ohio St. 468, 30 N.E.2d 805 (1940).

In construing the legislative requirements of § 119.12, an Ohio Court of Common Pleas in *Bolt v. Bureau of Motor Vehicles*, 41 Ohio Misc. 139, 324 N.E.2d 802 (1974), held that failure to file a timely notice of appeal pursuant to § 119.12 robs the Court of Common Pleas of the power to entertain jurisdiction: "The filing of the notice of appeal with the court does not comply with the provisions of R.C. 119.12 for the purpose of establishing jurisdiction to hear this appeal on the merits in this Court." *Id.* at 142, 324 N.E.2d at 804. Similarly in *Harris v. Lewis*, 69 Ohio St. 2d 377, 433 N.E.2d 223 (1982), the litigant failed to file a notice of appeal from an agency's decision in the correct court of common pleas as specified by § 124.34. Since the litigant had not complied with the statute, the Ohio Supreme Court held that the Court of Common Pleas which actually heard the case lacked "subject

matter jurisdiction" to entertain the appeal. *Id.* at 381, 433 N.E.2d at 226.

The fact that Ohio considers failure to file a timely notice of appeal to be jurisdictional may also be seen in its Rules of Appellate Procedure. The Court of Common Pleas in this [16] instance is acting as an appellate tribunal, Ohio Rev. Code Ann. § 2505.01 (Page 1982), and has no power to resolve a claimant's dispute with the administrative agency except on review. Rule 3A of the Ohio Rules of Appellate Procedure, which is identical in this respect to the corresponding federal rule (F.R.A.P. 3(a)), specifies that:

> "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal."

Failure to file a timely notice of appeal may affect the jurisdiction of a reviewing court, but it does not trench upon the "validity of an appeal". *Zier v. Bureau of Unemployment Compensation*, 151 Ohio St. 123, 125, 84 N.E.2d 746, 748 (1949) (requirement to file timely notice of appeal is a "condition precedent" to jurisdiction).[11] Although the Ohio trial and appellate courts in the instant case did not use "without prejudice" terminology, the appellate court clearly indicated that the action was barred on the jurisdictional ground specified above. *Gibson v. Summers Construction Corp.*, 163 Ohio St. 220, 229, 126 N.E.2d 326, 331 (1955) (if ground of dismissal clearly was jurisdictional, it is irrelevant that the state court did not employ

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11. Under the federal rules, timely filing of an appeal has long been held "mandatory and jurisdictional". *United States v. Robinson*, 361 U.S. 220, 229 (1960).

the dismissal without prejudice language); *cf. Costello v. United States*, 365 U.S. 265, 284-88 (1961) (trial court's failure to specify that action was dismissed without prejudice is not dispositive). We conclude that under Ohio law, Donnelly's failure to perfect his appeal as prescribed by Ohio Rev. Code Ann. §§ 124.34 and 119.12 was "otherwise than on the merits", leaving him free to pursue his § 1983 claim in the federal court.

[17] In essence, therefore, the Cuyahoga County Court of Appeals held that it did not have jurisdiction to review the Civil Service Commission's adjudication. Unlike in *Kremer*, *supra*, the reviewing state court here cannot be understood to have approved or affirmed the administrative adjudication. Rather, that adjudication stands unappealed and carries no claim preclusion effect.[13] *Kremer*, *supra*, 456 U.S. at 477. As the Fourth Circuit recently stated, "The choice of whether to proceed in a state or federal forum, however, necessarily belongs to the plaintiffs and they cannot be deprived of it by a state rule which gives preclusive effect to unappealed state administrative decisions. A contrary rule would frequently force plaintiffs to choose between foregoing the opportunity to resolve their problems before state administrative bodies and relinquishing their congressionally mandated access to federal courts." *Moore v. Bonner*, 690 F.2d 799, 801 (4th Cir. 1982) (unappealed decision of state administrative agency not entitled to "full-faith-and-credit dignity accorded state court decisions").

The full faith and credit statute requires us to place ourselves in the state court's position only to the extent

13. The facts adjudicated at the administrative hearing do have collateral estoppel effect. *See generally United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966); *see also* Restatement (Second) of Judgments § 83(2) comment b (1982).

that the prior adjudication was "on the merits". To bar this action would preclude Donnelly from airing his constitutional claim in any judicial forum.[14] We believe that it is this controlling principle that has prompted other federal courts to reach the same result as we do today. *Gargiul v. Tompkins*, 704 F.2d 661, 667 (2d Cir. 1983); *Hernandez Jimenez v. Calero Toledo*, 576 F.2d 452, 454 (1st Cir. 1978); *Griffin v. George R. Buck* [18] *Consulting Actuaries*, 551 F. Supp. 1385, 1386 n.2 (S.D.N.Y. 1982).

IV.

We therefore proceed to the merits of the due process claims of both Loudermill and Donnelly. As civil service employees both enjoyed a cognizable interest in continuing employment absent cause for discharge. The state could abrogate their entitlement only by observing the strictures of due process. *Jackson v. Kurtz*, 65 Ohio App. 2d 152, 157-58, 416 N.E.2d 1064, 1068 (1979). The two employees claim that the process they received was constitutionally infirm.

Loudermill and Donnelly first allege that, without an opportunity to respond to the charges against them prior to termination, they were denied due process. While the state responds that the post-discharge hearing provided in § 124.34 is sufficient,[14] appellants urge that, if they had

13. Given the constraints of Ohio law, the administrative agency clearly lacked the power to grant the procedural due process claim. *Parfitt v. Columbus Correctional Facility*, 62 Ohio St. 2d 434, 406 N.E.2d 528, *cert. denied*, 449 U.S. 1061 (1980); *see generally* Restatement (Second) of Judgments § 83(2) comment g (1982).

14. We recognize that the Ohio Supreme Court has held that no pre-termination process is constitutionally required. *Parfitt v. Columbus Correctional Facility*, *supra* note 13, 62 Ohio St. 2d at 438, 406 N.E.2d at 531. We of course are not bound by that court's constitutional adjudication.

been afforded some limited right to challenge the impending discharges, the discharge orders might well have been rescinded. They argue not for a full fledged evidentiary hearing, but rather for an opportunity to present their side of the case, whether in person or by letter. They root their due process claim in the oft-quoted adage that due process requires that the state afford a hearing "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Although the Supreme Court has never delineated the situations in which pre-termination hearings are constitutionally required, it has been confronted with such claims on several occasions. We start with the Court's seminal opinion in *Arnett v. Kennedy*, 416 U.S. 134 (1974), which dealt with the extent to which the federal government must provide protection [19] to its civil service employees before discharge. Although no consensus in reasoning emerged, a majority agreed that a public employee was not entitled to a full evidentiary hearing prior to discharge. Appellees in the instant case urge that the analysis in Justice Rehnquist's plurality opinion disposes of appellants' claims here: "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet." *Id.* at 153. Since § 124.34 limits an employee's right to a full evidentiary hearing after discharge at the same time that it first vests the property right to continuing employment, appellees argue that no pre-termination notice or hearing is required. The district court in its *Loudermill* opinion agreed with appellees that *Arnett* "mandates that the issue be resolved in favor of the post-dismissal hearing that Loudermill actually received."

The plurality view in *Arnett*, however, has yet to be enshrined in our law. Rather, federal due process rights, which may not be the same as state procedural guarantees, must be accorded before a state deprives one of a property interest. Indeed, Justice Powell's forceful concurrence, which was necessary to reach a majority in *Arnett*, repudiated the plurality's reasoning: "This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Id.* at 167 (Powell, J., concurring).

Subsequent Supreme Court cases have followed Justice Powell's view. For example, in *Vitek v. Jones*, 445 U.S. 480 (1980), the Court held that a prison inmate must be afforded notice and an opportunity to be heard before being transferred to a mental hospital. The majority reaffirmed that, [20] once an entitlement has been found, an independent determination of whether federal due process requirements were observed must still be made: "These minimum requirements being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Id.* at 491; *see also Skotnicky v. Kramer*, 455 U.S. 748, 755 (1982). In other words, the fact that Ohio provided appellants in this case with full evidentiary hearings after termination does not suggest that no other process was due. We must determine independently whether the post-termination hearings provided under Ohio's statutory scheme satisfied federal due process requirements.

The Supreme Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976), sets forth the competing interests of the government and the individual that must be accommodated to assess what process is due: the importance of the private interest affected by the governmental action; the risk of governmental error through the procedures used; and the magnitude of the governmental interest involved. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). While we do not suggest that a general rule has yet emerged, the Ninth Circuit has distilled the long line of Supreme Court cases and has concluded that "[t]here is a strong presumption that a public employee is entitled to some form of notice and opportunity to be heard before being deprived of a property or a liberty interest." *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773, 778 (9th Cir. 1982).

Appellees in the instant case argue that even a cursory comparison with *Mathews* obviates the need for further analysis. They point out that the Supreme Court in *Mathews*, after balancing the pertinent factors, held that the government could terminate social security disability payments without first conducting an evidentiary hearing. Appellees urge that termination of disability benefits could cause greater financial harm to the individual than loss of employment, since other [21] avenues of income in the latter situation might exist. We think that appellee's massive reliance on *Mathews* is misplaced. The government in *Mathews* did afford the individual substantial protections before deciding to terminate disability benefits. It advised the recipient that the benefits might be terminated, summarized the evidence as to why the termination might be effected, and informed the recipient that he or she had a right to respond in writing and submit additional evidence. *Id.* at 337-38. In upholding the constitutionality of the government's procedures, the Court explained that "the ordinary principle, established by our decisions, [is] that something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 343. Depending upon the situation, the "something less than an evidentiary hearing" may be constitutionally required.[15]

We start by recognizing that the private interest at stake, public employment, unquestionably is of vital importance to [22] both Loudermill and Donnelly. Employment provides not only financial livelihood, but frequently self-esteem and social status. Dismissal therefore may deprive the employee of needed income, and, in some circumstances, it may rob the employee of a protected

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15. In denying appellants' joint motion to amend the judgment, the district court in the instant case switched its original reliance on the plurality opinion in *Arnett* to the concurrence by Justice Powell. The court construed the concurrence as precluding an examination of whether pre-termination procedures were constitutionally required. On the contrary, Justice Powell emphasized:

> "Appellee also argues that the absence of a prior evidentiary hearing increases the possibility of wrongful removal and that delay in conducting a post-termination evidentiary hearing further aggravates his loss. The present statute and regulations, however, already respond to these concerns. The affected employee is provided with 30 days' advance written notice of the reasons for his proposed discharge and the materials on which the notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision. . . . These procedures minimize the risk of error in the initial removal decision and provide for compensation for the affected employee should that decision eventually prove wrongful."

416 U.S. at 170 (Powell, J., concurring). Justice Powell recognized that pre-termination procedures could play a critical role in affording litigants due process. He relied in part on his concurrence in *Arnett* in authoring *Mathews*, 424 U.S. at 334. Thus, neither *Arnett* nor *Mathews* lends support to the district court's position in the instant case.

liberty interest as well. In the instant cases, both employees allegedly suffered greatly from their terminations. The notice of discharge stigmatized Loudermill as dishonest, and he suffered financially from the dismissal. Even though Donnelly eventually was reinstated, he too, allegedly suffered economic loss, at least in the interim.

Under the second *Mathews* factor, we must gauge the proposed procedure to determine whether its use would have minimized error. Providing a limited opportunity to present evidence before dismissal is critical to ensure that the proper governmental response ensues. With more information, in particular that provided by the employee whose record is in dispute, the government presumably would be better equipped to make employment decisions. For example, in the instant case Loudermill could have presented his defense of good faith mistake—that he did not know that he had been convicted of a felony. The conviction occurred twelve years earlier. Perhaps through negotiations he thought a misdemeanor charge had resulted. Even if Loudermill were clearly wrong, he should have been afforded the chance to respond; for he was dismissed not because of the prior conviction per se, but because of alleged dishonesty. Donnelly's case for a pre-termination opportunity to present evidence is even more compelling since he eventually was reinstated. If Donnelly had been able to inform his employer that at least one other employee had been retained despite failing the eye examination, Donnelly might never have been discharged at all. Thus, even a limited opportunity to respond before termination can minimize the risk of error.

Application of the third *Mathews* factor requires us to inquire into the magnitude of the governmental interest involved. The government has interests in minimizing

its administrative [23] burdens and in ensuring effective employee discipline. While a full hearing before termination as sought in *Mathews* and *Arnett* might be too time consuming and expensive, an abbreviated opportunity to respond should not lead to excessive delay and its cost should be minimal. Affording that opportunity in the instant cases, therefore, would not have sorely depleted the municipalities' financial resources, nor have impeded their ability to maintain discipline. In an emergency, of course, a municipality might choose to suspend an employee pending investigation. Even in Loudermill's case, however, it never demonstrated that an emergency existed. No emergency was even conceivable with respect to Donnelly.

On balance, therefore, we conclude that the compelling private interest in retained government employment, combined with the substantial safeguard of presenting evidence before dismissal, outweighs the added administrative burdens of the pre-termination process that would have been imposed upon the municipalities.

Our conclusion is bolstered by analogy to Supreme Court decisions that have required pre-termination hearings both before and after *Mathews*. In *Bell v. Burson*, 402 U.S. 535, 539-41 (1971), the Court ruled that a state may not suspend a driver's license, if protected by entitlement, until some form of hearing is conducted. Similarly, before a school may suspend a student who enjoys an entitlement to continuing schooling, it must provide some form of pre-suspension hearing. *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975). *See also Vitek v. Jones*, *supra*, 445 U.S. at 492-94 (a prisoner must be afforded a hearing before transfer to a mental hospital). We believe that the opportunity to challenge a discharge is at least as critical as the opportunity to challenge the suspension of a driver's

license or a several day suspension from school. We also find it persuasive in the instant case, as in those referred to above, that the governmental body realistically could have provided some protection for the litigant without unduly [24] adding to its own administrative burdens. In contrast, in those cases in which pre-deprivation hearings were not required, affording process before the deprivation was just not feasible or practical. *E.g., Parratt v. Taylor*, 451 U.S. 527, 540-42 (1981) (pre-deprivation hearing not realistic when prison guard negligently lost prisoner's hobby kit); *Ingraham v. Wright*, 430 U.S. 651, 678-82 (1977) (same in context of corporal punishment in a school; possibility of subsequent tort suit sufficient).[16]

We therefore hold that appellees' failure to afford Loudermill and Donnelly an opportunity to present evidence challenging the proposed discharges violated the Fourteenth Amendment.[17] Section 124.34 cannot be applied constitutionally in such a way as to deny the rudiments of due process. Although damages for the due process violations may be difficult to prove, *Carey v. Piphus*, 435 U.S. 247, 262-63 (1978), the district court's

16. We note that other courts of appeal have held that due process requires some form of pre-termination hearing in related contexts. *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773, 778-79 (9th Cir. 1982); *Gomez v. Sonora Independent School District*, 603 F.2d 522, 525 (5th Cir. 1979). *But cf. Clechon v. City of Chicago*, 634 F.2d 1055 (7th Cir. 1980) (no hearing required before firemen suspended).

17. Donnelly's equal protection claim was dismissed without prejudice by the district court. The court, in denying the motion to amend the judgment, held that "[a]lthough Donnelly alleged no facts, in support of his equal protection claim, it was dismissed without prejudice on the ground that he might have possessed a state cause of action for backpay." We agree that Donnelly's equal protection claim does not survive serious scrutiny. Donnelly makes no allegation that he was the victim of any particular animus, nor does he claim that he is a member of a protected class. *See Cook v. City of Price*, 568 F.2d 690, 701 (10th Cir. 1977).

dismissal of the two complaints must be reversed and the cases remanded for further proceedings.[18]

V.

[25] We turn finally to appellants' claims that the delays in post-termination hearings deprived them of due process. Neither employee received a hearing within the thirty day statutory period provided by § 124.34. Note 2 *supra*. In Loudermill's case, a referee of the Cleveland Civil Service Commission did not conduct a hearing until three months after Loudermill received his notice of dismissal, and the full Commission did not hold a hearing until eight months had elapsed. In Donnelly's case, the Parma Civil Service Commission did not hold a hearing until nine and one-half months after his dismissal. The two appellants argue, first, that the state's failure to meet its own statutory deadline is constitutionally impermissible, and, second, that the delays themselves were so excessive as to violate due process.

The thirty day statutory period here involved does not give rise to a procedural entitlement. In *Olim v. Wakinekona*, 51 U.S.L.W. 4491 (U.S. April 26, 1983) (No. 81-1581), the Supreme Court rejected a due process claim based in part on the state's failure to afford a claimant the procedural protections prescribed by statute: "Process is not an end in itself. Its constitutional purpose is to

18. Loudermill and Donnelly also alleged that the failure to hold pre-termination hearings violated their protected "liberty" interests. We find no liberty interest whatsoever in Donnelly's discharge—dismissal for failure to pass an eye examination cannot be characterized as stigmatizing. Furthermore, while the discharge of Loudermill might be considered stigmatizing, he failed to allege that the reasons for his dismissal were "published", a prerequisite to any liberty interest claim. *Stuttgatter v. Borgland*, 697 F.2d 1090, 1092 (5th Cir. 1979). Accordingly, we affirm the district court's dismissal of those parts of the complaints which it construed as raising a Fourteenth Amendment liberty interest.

protect a substantive interest to which the individual has a legitimate claim of entitlement." *Id.* at 4494. *See Bills v. Henderson*, 631 F.2d 1287, 1298-99 (6th Cir. 1980) ("every deviation from state procedures cannot be viewed as a federal constitutional violation"). Moreover, Ohio courts have ruled that the thirty day period is more of a guide than a strict requirement. *E.g., In re Brookar*, 53 Ohio Misc. 13, 17, 372 N.E.2d 1345, 1347 (1977). The statutory period attempts to ensure expedited review, but the state's failure to hold hearings within that period in and of itself did not violate appellants' constitutional rights.

[26] Although violation of the literal terms of the statute does not run afoul of due process, at some point delay in post-termination hearings may constitute a constitutional violation. Due process requires that a hearing be held, not just "in a meaningful manner", but also at a "meaningful time". With each passing month, employees may suffer increased financial privation and social stigma. The Supreme Court in *Barry v. Barchi*, 443 U.S. 55 (1979), reaffirmed the need to hold prompt post-termination hearings. The New York State Racing & Wagering Board had suspended a horse trainer because of evidence disclosed after a race that his entry in the race had been drugged. By statute, the trainer had no means of challenging his suspension until the disciplinary action became final. The Court held that "[o]nce suspension has been imposed, the trainer's interest in a speedy resolution of the controversy became paramount . . . . We also discern little or no state interest, and the State has suggested none, in an appreciable delay in going forward with a full hearing." *Id.* at 66; *see also Blankenship v. Secretary of H.E.W.*, 587 F.2d 329, 334 (6th Cir. 1978) (holding on statutory grounds that an average delay of 220 days in social security hearings was unreasonable).

Unlike in *Barry*, however, Ohio does provide in § 124.34 a mechanism for prompt review. Even if Ohio fails to meet its thirty day goal due to any number of possible reasons,[18] claimants can file a petition for mandamus to expedite the review process, such as the one successfully filed by Donnelly. Thus, in contrast to the situation in *Barry*, almost all post-termination hearings under § 124.34 should be held with a "reasonable" period after the termination.

[27] This is not to suggest that abuses in individual cases under § 12.434 may not occur. We hold only that the delay must be "excessive" or "unreasonable" before federal due process is denied. Although determining a reasonable time period defies easy exegesis, we note that the Supreme Court has permitted delays comparable to the ones in the instant cases. In *Arnett*, *supra*, the employee claimed that he could not have obtained review for at least three months after the adverse administrative determination. Justice Rehnquist responded, "We assume that some delay attends vindication of an employee's reputation through the hearing procedures provided on appeal, and conclude that at least the delays cited here do not entail [a deprivation of due process]." 416 U.S. at 198. Similarly, in *Matthews*, *supra*, the social security claimant argued that the ten or eleven month average delay in post-termination hearings deprived him of due process. The Court rejected that argument, assuming apparently that such a delay, while possibly creating hardships, simply did not rise to a constitutional violation. 424 U.S. at 341-42.

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18. The delays in the instant cases in all likelihood were inadvertent—the Commission's delay in Loudermill's situation probably stemmed from administrative backlog and the delay in Donnelly's more unique case arose from the litigation in the state courts over whether Donnelly had properly appealed from the Board of Education's decision.

While we do not condone the delays in the two cases before us, we hold that neither delay violated due process.

To summarize: we affirm the district court's dismissal of that part of appellants' complaints which alleged that the delays in post-termination hearings violated their due process rights; and we affirm the district court's dismissal of Donnelly's equal protection claim and its dismissal of both appellants' claims of violation of their liberty interests. We vacate, however, that part of the district court's judgment that dismissed the pre-termination procedural due process claims. Upon remand, appellants may seek to prove that they sustained damages stemming from the state's failure to provide any pre-termination due process.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

[28] WELLFORD, *Circuit Judge*, concurring and dissenting.

I agree with that portion of the opinion holding that appellants' failure to exhaust state judicial remedies does not require dismissal under the circumstances presented. I also concur in the statement in footnote 5 that *Patsy v. Board of Regents*, ___ U.S. ___, 102 S. Ct. 2557 (1982) "has not precluded the possibility of fashioning future exceptions to the no-exhaustion rule. . . ." *See Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981); *Parratt v. Taylor*, 451 U.S. 527 (1981).

I would hold, however, that Donnelly is precluded from proceeding in this court after his identical claims in the Ohio State Courts were dismissed with prejudice by the Court of Common Pleas, this judgment was affirmed after a timely notice of appeal by the Ohio Court of Appeals, Eighth District, and appellant Donnelly's motion for an order directing the court of appeals to certify its record was overruled by the Ohio Supreme Court. Donnelly was afforded an opportunity for further eye testing before his termination, received a full post-termination hearing before the Parma Civil Service Commission, and, as conceded, has been reinstated to his former job. *See Barry v. Barchi*, 443 U.S. 55 (1979); *Castorr v. Brundage*, 674 F.2d 531, 536 (6th Cir.), *cert. denied*, ___ U.S. ___, 103 S. Ct. 240 (1982); *Clechon v. City of Chicago*, 634 F.2d 1055 (7th Cir. 1980).

Furthermore, I would hold that appellants have been afforded minimal due process requisites under the totality of circumstances in these cases. The property interest which appellants had in their continued state or public employment "was itself conditioned by the procedural limitations which had accompanied the grant of that interest."[1] *Arnett v. Kennedy*, 416 U.S. 134, 153 (1974). The procedures afforded Loudermill and Donnelly under the Ohio Civil Service laws, [29] in my view, were substantially equivalent to those afforded the federal employee, Arnett,[2] and they afforded reasonable redress if the basis for the purported termination were found to be erroneous. The Ohio Supreme Court's determination that the Ohio procedures comport with due process requirements, while not controlling, is significant. *See Purfist v. Columbus Correctional Facility*, 62 Ohio St. 2d 434 (1980). Other similar state law procedures for termination of public employees have been held to comply with due process re-

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1. It is acknowledged that this "conditional property interest" rationale did not have the support of a majority of the Court in *Arnett*.

2. Five members of the Court (Justices Rehnquist, Burger, Stewart, Powell, and Blackmun) found the post-termination hearing procedure in *Arnett* to be constitutionally adequate.

quirements. *Webb v. Dillon*, 593 F.2d 636 (5th Cir. 1979), *Clechon v. City of Chicago*, supra.

Vitek v. Jones, 445 U.S. 480 (1980), relied upon in the majority opinion, applies to a liberty interest, rather than a property interest. The transfer to a state mental hospital in *Vitek* took place without any hearing requirement at any time for the prisoner. That such a procedure was held to deprive the prisoner of his liberty interest without due process is not persuasive in the instant situation. Deprivation of a liberty interest and deprivation of a property interest, even of the same person occasioned by the same act, are not the same. *See Vanelli v. Reynolds School District No. 7*, 667 F.2d 773, 781 (9th Cir. 1982).[3] *Santosky v. Kramer*, 455 U.S. 745 (1982), involved standard-of-proof procedural requirements to be afforded natural parents of a child before the termination of their parental rights by the state. Something more than a "fair preponderance of the evidence" was required before a parent's vital interest in his (or her) child could be cut off. That decision is not, in my view, particularly pertinent to the issues involved *sub judice* except the holding that minimum [30] requirements of due process are a matter of federal law, a question about which there is no dispute in this case.

Neither does *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), also cited by the majority opinion, mandate a pre-termination hearing. The Court there held:

> What the Fourteenth Amendment does require, however, "is 'an opportunity . . . granted at a meaningful

3. In Loudermill's case, after a full hearing his termination was found to be justified. Under the rationale of *Vanelli*, his damages, if any, should be limited to those which occurred between the time of his termination and the time of the hearing afforded him before the referee of the Civil Service Commission.

> time and in a meaningful manner,' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case,' *Mullane v. Central Hanover Tr. Co.*, supra, at 313." *Boddie v. Connecticut*, 401 U.S. at 378.

Id. at 437.

In *Logan*, *Matthews v. Eldridge*, 424 U.S. 319 (1976), and *Barry v. Barchi*, 443 U.S. 55 (1979), are cited for the proposition that,

> [a] post-termination hearing [is] permitted where the decision to terminate was based on a reliable pretermination *finding* (emphasis added).

Logan, 455 U.S. at 436.

Under the facts of these cases, I would conclude that as to both appellants there was a "reliable pretermination finding" that cause existed for the termination of Donnelly and Loudermill, and that each was afforded a due process hearing at a "meaningful time and in a meaningful manner." *See Armstrong v. Manzo*, supra, and *Mathews v. Eldridge*, supra.

Accordingly, I would affirm the decision of the district court in both cases.

MEMORANDUM OF OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed November 6, 1981)

Case No. C81-2132

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES LOUDERMILL, etc.
Plaintiff,

v.

CLEVELAND BOARD OF EDUCATION, *etc. et al.*,
Defendant.

MEMORANDUM OF OPINION

On October 27, 1981 plaintiff, James D. Loudermill, filed the above-captioned case alleging that the following defendants violated his civil rights under 42 U.S.C. § 1983: (1) the Cleveland Board of Education and its President, John Gallagher, in his individual capacity; 2) the City of Cleveland and its Mayor, George V. Voinovich, in his individual capacity; and 3) the Cleveland Civil Service Commission and its President, Thomas R. Skulina, in his individual capacity.[1] Jurisdiction is invoked pursuant to 28 U.S.C. § 1343[2] and 2201.[3] Attached to Loudermill's complaint was a motion to proceed in *forma pauperis*. 28 U.S.C. § 1915. For the reasons which follow Loudermill's request to proceed in *forma pauperis* is denied and the case is dismissed. 28 U.S.C. § 1915(d).[4]

In 1979 Loudermill was employed as a security guard by a private firm which was under contract to provide security guards to the Cleveland City School District. When this firm declared bankruptcy Loudermill applied for similar employment with the Cleveland City School District itself. On his employment application Loudermill specified that he had never been convicted of a felony. On or about September 25, 1979 Loudermill's application for employment was accepted by the Cleveland Board of Education and he began work as a security guard.[5]

On September 1, 1980 Loudermill was transferred to the jurisdiction of the Department of Safety and Security. Pursuant to this transfer a routine examination of employment records was conducted on all employees. The examination of Loudermill's records revealed that he had been convicted of grand larceny in 1968. Consequently, on November 3, 1980, the business [2] manager of the Cleveland Board of Education forwarded a letter to Loudermill advising him that he had been dismissed from his employment on the ground of dishonesty. *See*: Ohio Rev. Code Ann. § 124.34 (Page 1979).[6] Loudermill was not given any opportunity prior to his dismissal to challenge its reasoning although he claims that he could have asserted a legitimate defense.[7] On November 12, 1980 Loudermill filed a notice of appeal with the Cleveland Civil Service Commission.[8] A hearing before a commission referee originally scheduled for January 22, 1981 was postponed until January 29, 1981. On April 1, 1981 the referee filed his findings and recommendation.[9] On July 20, 1981 a hearing on Loudermill's claim was conducted before the full Cleveland Civil Service Commission which orally announced that it would affirm Loudermill's dismissal from employment. On August 10, 1981 the commission approved proposed findings of fact and conclusions of law. On August 21, 1981 Loudermill's

attorneys were advised of the commission's action by ordinary mail. Loudermill's complaint fails to allege whether he perfected any appeal to the Cuyahoga County, Ohio Court of Common Pleas as provided by Ohio Rev. Code Ann. § 124.34 (Page 1979)."

Loudermill claims that Ohio Rev. Code Ann. § 124.34 (Page 1979), violates the Due Process Clause of the Fourteenth Amendment because it provides no opportunity for a classified civil service employee to respond to charges against him prior to dismissal and because classified civil service employees are not given sufficiently prompt post-dismissal hearings on appeal. For the reasons which follow this court holds that each of Loudermill's claims are without merit and that Ohio Rev. Code Ann. § 124.34 (Page 1979), does not violate the Due Process Clause of the Fourteenth Amendment because it fails to provide a classified civil service employee the right to a hearing prior to dismissal from employment.

The thrust of Loudermill's due process claim is that the failure of the statute to provide him with a pre-dismissal hearing constituted an unconstitutional deprivation of his "property" and "liberty" interests. In *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972), the United States Supreme Court held that a hearing, guaranteed by procedural due process in order to protect a property interest, is required only if a state or persons acting under color [31] of state law, act to deprive another of "the security of interests that . . . [he] has already acquired in specific benefits." 408 U.S. at 576, 92 S. Ct. at 2708. The Court held further that to possess a property interest, a person must "have legitimate claim of entitlement to it." 408 U.S. at 577, 92 S. Ct. at 2709. *See also: Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694 (1972). Ohio Rev. Code Ann. § 124.34 (Page 1979), provides

in pertinent part that "[t]he tenure of every officer or employee in the classified civil service . . . shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended or removed . . ." it is clear that Loudermill possessed a "property" interest in his continued employment and, therefore, was entitled to some kind of hearing regarding his dismissal. The question presented, however, is whether protection of Loudermill's procedural due process rights was adequately assured by the post-dismissal hearing he received or, whether a pre-dismissal hearing was necessary. This court holds that the United States Supreme Court's decision in *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633 (1974), mandates that the issue be resolved in favor of the post-dismissal hearing that Loudermill actually received.

In *Arnett*, it was asserted that the former 5 U.S.C. § 7501(a), a section of the Lloyd-LaFollette Act which authorized the dismissal of federal employees for "such cause as will promote the efficiency of the service," was unconstitutional on the ground that federal employees possessed property interests in their continued employment which could not be divested without first affording them a full adversary hearing. The principal premise for this contention was a construction of the Court's prior holdings in *Roth*, *supra* and *Sinderman*, *supra*. After finding that federal employees did possess a vested property right in their continued employment under the statute, the Court rejected the contention that such a right could not be divested without first affording the affected federal employee a full adversary hearing because the very section of the statute which provided the right to continued employment also provided for the procedure by which "cause" was to be determined and that procedure, similar to that

involved in the instant case, was a post-dismissal hearing. In other words, if a statute at once confers upon an employee the right not [4] to be discharged from employment except for "cause" and the same section prescribes the procedural means by which that right is to be protected, the statute does not create an expectancy of retention of employment requiring procedural protection under the due process clause beyond that provided by the statute. The Court reasoned:

> Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. . . . Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement. The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause.

Arnett v. Kennedy, 416 U.S. at 152, 94 S. Ct. at 1643 (1974). Since Ohio Rev. Code Ann. § 124.34 (Page 1979),[11] not only provides that classified civil service employees have vested property rights to continued employment, but, in the same section, provides the reasons that employees may lose such rights, as well as the procedure for reviewing such determinations, it does not offend the Due Process Clause of the Fourteenth Amendment. As held by the United States Supreme Court:

> where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet.

Arnett v. Kennedy, 416 U.S. at 153, 154, 94 S. Ct. at 1644 (1974). Accordingly, this court holds that Loudermill's claim that Ohio Rev. Code Ann. § 124.34 (Page 1979), deprives him of a vested property interest without procedural due process is without merit.

Loudermill also claims that since he was dismissed from employment on the ground of dishonesty, a pre-dismissal hearing was required in order to assure that he would not be deprived of a protected "liberty" interest without procedural due process of law. In *Board of Regents v. Roth*, *supra*, the United States Supreme Court reasoned:

> [5] The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. *For "[w]here a person's good name, reputation honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."* Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S. Ct. 507, 510, 27 L.Ed.2d 515; Wieman v. Updegraf, 344 U.S. 183, 191, 73 S. Ct. 215, 219, 97 L.Ed. 216; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817; United States v. Lovett, 328 U.S. 303, 316-317, 66 S.Ct.

1073, 1079, 90 L.Ed. 1232; Peters v. Hobby, 349 U.S. 331, 352, 75 S.Ct. 790, 801, 99 L.Ed. 1129 (Douglas, J., concurring). See Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 896, 81 S. Ct. 1743, 1750, 6 L.Ed.2d 1230. In such a case, due process would accord an opportunity to refute the charge before University officials. (Footnote omitted). (Emphasis added).

407 U.S. at 573, 92 S. Ct. at 2707. Since Loudermill was dismissed from employment on the ground of dishonesty there is no doubt that he possessed a liberty interest in his "good name, reputation, honor or integrity" requiring procedural due process protection. *Arnett v. Kennedy, supra*, holds, however, that

> [s]ince the purpose of the hearing in such a case is to provide the person "an opportunity to clear his name," a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause.

416 U.S. at 157, 94 S. Ct. at 1646. Accordingly, this court holds that Loudermill's claim that Ohio Rev. Code Ann. § 124.34 (Page 1979), deprives him of a vested liberty interest without procedural due process is without merit.

Loudermill's final claim is that Ohio Rev. Code Ann. § 124.34 (Page 1979), deprives all dismissed classified civil servants procedural due process because they are not given sufficiently prompt hearings on appeal. With regard to time limitations on appeals, Ohio Rev. Code Ann. § 124.34 (Page 1979), provides in pertinent part:

> Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.

[6] The Ohio Courts have held the time limitations provided in the statute are not mandatory. *E.g., In re Brooker*, 53 Ohio Misc. 13, 372 N.E.2d 1343 (Ct. Com. Pl. Mont. Cty. 1977). In *Arnett v. Kennedy, supra*, the United States Supreme Court was confronted with a claim similar to that raised by Loudermill. The Court held:

> [w]e assume that some delay attends vindication of an employee's reputation throughout the hearing procedures provided on appeal, and conclude that at least the delays cited here [a period of over three (3) months] do not entail any separate deprivation of a liberty interest recognized in *Roth*.

416 U.S. at 158, 94 S. Ct. at 1646.

In the instant case Loudermill was dismissed from employment on November 3, 1980. He filed a notice of appeal on November 12, 1980. An initial hearing on Loudermill's claim was conducted on January 29, 1981 by a Cleveland Civil Service Commission referee, who one month thereafter, filed findings of fact along with a recommendation. On July 20, 1981 Loudermill's claim was heard by the full civil service commission which orally announced that it would affirm Loudermill's dismissal. On August 10, 1981 the commission approved proposed findings of fact and conclusions of law. Since this court is well aware of the congested nature of the dockets of adminis-

trative agencies such as the Cleveland Civil Service Commission, the court holds that the delay which occurred in processing Loudermill's appeal in the instant case did not constitute a violation of his procedural due process rights. *See: Arnett v. Kennedy, supra; Board of Regents v. Roth, supra.*

Accordingly, plaintiff's motion to proceed *in forma pauperis* is denied and the case is dismissed with prejudice for failure to state a claim upon which relief can be granted.[4] Fed. R. Civ. P. 12(b)(6). *See: Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99 (1957); *Davis H. Elliot Co. v. Caribbean Utilities Co.*, 513 F.2d 1176 (6th Cir. 1975).

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

FOOTNOTES

1. William J. Brown, the Attorney General of the State of Ohio, is also a named defendant. He is so named, however, only because the constitutionality of a particular Ohio statute has been drawn into question by the instant case. None of the allegations contained in the complaint apply to Brown and no relief is sought against him.

2. 28 U.S.C. § 1343 provides as follows:

(a) The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section -

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. 28 U.S.C. § 2201 provides as follows:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

4. 28 U.S.C. § 1915(d) provides as follows:

The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

5. A security guard is a classified civil service employee pursuant to Ohio Rev. Code Ann. § 124.11 (Page 1980), which provides as follows:

The civil service of the state and the several counties, cities, civil service townships, city health districts, general health districts, and city school districts thereof shall be divided into the unclassified service and the classified service.

(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter:

(1) All officers elected by popular vote or persons appointed to fill vacancies in such offices;

(2) All election officers and the employees and clerks of persons appointed by boards of elections;

(3) The members of all boards and commissions, and heads of principal departments, boards, and commissions appointed by the governor or by and with his consent; and

the members of all boards and commissions and all heads of departments appointed by the mayor, or, if there is no mayor such other similar chief appointing authority of any city or city school district; except as otherwise provided in division (A)(17) or (C) of this section, this chapter does not exempt the chiefs of police departments and chiefs of fire departments of cities or civil service townships from the competitive classified service;

(4) The members of county or district licensing boards or commissions and boards of revision, and deputy county auditors;

(5) All officers and employees elected or appointed by either or both branches of the general assembly, and such employees of the city legislative authority as are engaged in legislative duties;

(6) All commissioned and noncommissioned officers and enlisted men in the military service of the state including military appointees in the office of the adjutant general;

(7) All presidents, business managers, administrative officers, superintendents, assistant superintendents, principals, deans, assistant deans, instructors, teachers, and such employees as are engaged in educational or research duties connected with the public school system, colleges, and universities, as determined by the governing body of said public school system, colleges, and universities; and the library staff of any library in the state supported wholly or in part at public expense;

(8) Three secretaries, assistants, or clerks and one personal stenographer for each of the elective state officers, and two secretaries, assistants, or clerks and one personal stenographer for other elective offices and each of the principal appointive executive officers, boards, or commissions, except civil service commissions, authorized to appoint such secretary, assistant, or clerk and stenographer;

(9) The deputies and assistants of elective or principal executive officers authorized to act for and in the place of their principals, or holding a fiduciary relation to such principals and those persons employed by and directly responsible to elected county officials and holding a fiduciary or administrative relationship to such elected county officials, and the employees of such county officials whose fitness would be impracticable to determine by competitive examination, provided, that this subdivision shall not affect those persons in county employment in the classified service as of September 19, 1941. Nothing in this subdivision applies to any position in a county department of welfare created pursuant to sections 329.01 and 329.10 of the Revised Code.

(10) Bailiffs, constables, official stenographers, and commissioners of courts of record, and such officers and employees of courts of record as the commission finds it

impracticable to determine their fitness by competitive examination;

(11) Assistants to the attorney general, special counsel appointed or employed by the attorney general, assistants to county prosecuting attorneys, and assistants to city directors of law;

(12) Such teachers and employees in the agricultural experiment stations; such student employees in normal schools, colleges and universities of the state; and such unskilled labor positions as the director of administrative services or any municipal civil service commission may find it impracticable to include in the competitive classified service; provided such exemptions shall be by order of the commission or the director, duly entered on the record of the commission or the director with the reasons for each such exemption;

(13) Any physician or dentist who is a full-time employee of the department of mental health or the department of mental retardation and developmental disabilities or of an institution under the jurisdiction of either department; and physicians who are in residency programs at the institutions;

(14) Up to twenty positions at each institution under the jurisdiction of the department of mental health or the department of mental retardation and developmental disabilities that the department director determines to be primarily administrative or managerial; and up to fifteen positions in any division of either department, excluding administrative assistants to the director and division chiefs, which are within the immediate staff of a division chief and which the director determines to be primarily and distinctively administrative and managerial;

(15) Noncitizens of the United States employed by the state, its counties or cities, as physicians or nurses who are duly licensed to practice their respective professions under the laws of Ohio, or medical assistants, in mental, tuberculosis, or chronic disease hospitals, or institutions;

(16) Employees of the governor's office;

(17) Fire chiefs and chiefs of police in civil service townships appointed by boards of township trustees under section 505.38 or 505.49 of the Revised Code;

(18) Employees of the Ohio rail transportation authority, except as otherwise provided in division (A) of section 4981.04 of the Revised Code;

(19) Executive directors, deputy directors, and program directors employed by community mental health boards under Chapter 340. of the Revised Code, and secretaries of the executive directors, deputy directors, and program directors;

(20) Superintendents of county boards of mental retardation and developmental disabilities and not more than three other positions of employment with each board as designated by the board.

(B) The classified service shall comprise all persons in the employ of the state and the several counties, cities, city health districts, general health districts, and the city school districts thereof, not specifically included in the unclassified service. Upon the creation by the board of trustees of a civil service township civil service commission, the classified service shall also comprise, except as otherwise provided in division (A)(17) or (C) of this section, all persons in the employ of civil service township police or fire departments having ten or more full-time paid employees to be designated as the competitive class and the unskilled labor class.

(1) The competitive class shall include all positions and employments in the state and the counties, cities, city health districts, general health districts, and city school districts thereof, and upon the creation by the board of trustees of a civil service township of a township civil service commission all positions in civil service township police or fire departments having ten or more full-time paid employees, for which it is practicable to determine the merit and fitness of applicants by competitive examinations. Appointments shall be made to, or employment shall be given to, all positions in the competitive class that are not filled by the promotion, reinstatement, transfer, or reduction, as provided in this chapter, and the rules of the director of administrative services, by appointment from those certified to the appointing officer in accordance with this chapter.

(2) The unskilled labor class shall include ordinary unskilled laborers. Vacancies in the labor class shall be filled by appointment from lists of applicants registered by the director. The director or the commission shall in his rules require an applicant for registration in the labor class to furnish such evidence or take such tests as the director considers proper with respect to age, residence, physical condition, ability to labor honestly, soberly, industry, capacity, and experience in the work or employment for which he applies. Laborers who fulfill the requirements shall be placed on the eligible list for the kind of labor or employment sought, and preference shall be given in employment sought, and preference shall be given in employment in accordance with the rating received from such evidence or in such tests. Upon the request of an appointing officer, stating the kind of labor needed, the pay and probable length of employment, and the number to be employed, the director shall certify from the highest on the list, double the number to be employed, from which the appointing officer shall appoint the number actually needed for the particular work. In the event of more than one applicant receiving the same rating, priority in time of application shall determine the order in which their names shall be certified for appointment.

(C) A municipal or civil service township civil service commission may place volunteer firemen who are paid on a fee-for-service basis in either the classified or the unclassified civil service.

6. Ohio Rev. Code Ann. § 124.34 (Page 1979), provides in pertinent part as follows:

> The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute a violation of Chapter 102. of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal. (Emphasis added).

7. Loudermill alleges that if he was given a pre-termination hearing he would have asserted that he was not dishonest when he completed his employment application form because at that time, he thought that he had only been convicted of a misdemeanor and not a felony.

8. Ohio Rev. Code Ann. § 124.34 (Page 1979), provides the following appellate procedure:

> In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.
>
> Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.
>
> In case of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officers or employee may appeal from the decision of the state per-

second board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.

In the case of the suspension for any period of time, or demotion, or removal of a chief of police or a chief of a fire department or any member of the police or fire department of a city or civil service township, the appointing authority shall furnish such chief or member of a department with a copy of the order of suspension, demotion, or removal, which order shall state the reasons therefor. Such order shall be filed with the municipal or civil service township civil service commission. Within ten days following the filing of such order such chief or member of a department may file an appeal, in writing, with the municipal or civil service township civil service commission. In the event such an appeal is filed, the commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority. An appeal on questions of law and fact may be had from the decision of the municipal or civil service township civil service commission to the court of common pleas in the county in which such city or civil service township is situated. Such appeal shall be taken within thirty days from the finding of the commission.

9. Loudermill's complaint fails to specify the content of either the referees findings or recommendations. Since Loudermill's claim was subsequently heard by the full civil service commission, however, this defect in pleading is of no consequence to the result reached in the instant case.

10. *See:* F.N. 6, *supra.*

11. *See:* F.N. 6, *supra.*

12. Since the court holds that Loudermill's complaint fails to state a claim upon which relief can be granted, his motion to certify the instant case as a class action is frivolous. Accordingly, the motion is denied.

Case No. C81-2152

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Ohio
Eastern Division

JAMES LOUDERMILL, etc.,
Plaintiff,

v.

CLEVELAND BOARD OF EDUCATION, etc., *et al.*,
Defendant.

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the plaintiff's motion to proceed in *forma pauperis* is denied and the case is dismissed with prejudice.

IT IS SO ORDERED.

/s/ *Jones M. Manos*
United States District Judge

MEMORANDUM OF OPINION OF THE UNITED STATES DISTRICT COURT

(Filed February 25, 1982)

Case Nos. C81-2132 and C81-2133

THE UNITED STATES DISTRICT COURT
For the Northern District of Ohio
Eastern Division

JAMES LOUDERMILL,
Plaintiff,

v.

CLEVELAND BOARD OF EDUCATION, *et al.*,
Defendants,

and

RICHARD DONNELLY,
Plaintiff,

v.

PARMA BOARD OF EDUCATION, *et al.*,
Defendants.

MEMORANDUM OF OPINION

On October 7, 1981 plaintiff, James D. Loudermill, filed the above-captioned case alleging that the following defendants violated his civil rights under 42 U.S.C. § 1983: (1) the Cleveland Board of Education and its President at the time of the events in question, John Gallagher; (2) the City of Cleveland and its Mayor, George V. Voinovich; and (3) the Cleveland Civil Service Commission and its President, Thomas R. Skulina. On that same date plaintiff, Richard Donnelly, filed a companion case alleging that the

following defendants violated his civil rights under 42 U.S.C. § 1983: (1) the Parma Board of Education and its President, Robert Koscielny; (2) the City of Parma and its Mayor, John Petruska; (3) the Parma Civil Service Commission and its chairman, Leo Hepner; and (4) Ralph Schell and Donald Narus, members of the Parma Civil Service Commission.[1] Jurisdiction in both suits was invoked under 28 U.S.C. § 1343.[2] On November 6, 1981 this court dismissed both cases for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The thrust of this court's holding was that Ohio Rev. Code Ann. § 124.34 (Page 1979),[3] which the plaintiffs claimed was unconstitutional, was not violative of the Due Process Clause of the Fourteenth Amendment under decisions of the United States Supreme Court in *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972); *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694 (1972) and *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633 (1974). The cases are currently before this court on the plaintiffs' joint motion to alter or [2] amend this court's previous holding. Fed. R. Civ. P. 59(e).[4] For the reasons which follow this court affirms its prior decision and holds that Ohio Rev. Code Ann. § 124.34 (Page 1979) is not violative of the Due Process Clause of the Fourteenth Amendment.

In 1979 Loudermill was employed as a security guard by a private firm which was under contract to provide security guards to the Cleveland City School District. When this firm declared bankruptcy Loudermill applied for similar employment with the Cleveland City School District itself. On his employment application Loudermill specified that he had never been convicted of a felony. On or about September 25, 1979 Loudermill's application for employment was accepted by the Cleveland Board of Education and he began work as a security guard.[5]

On September 1, 1980 Loudermill was transferred to the jurisdiction of the Department of Safety and Security. Pursuant to this transfer a routine examination of Loudermill's employment records was conducted which revealed that he had been convicted of grand larceny in 1966. Consequently, on November 3, 1980 the business manager of the Cleveland Board of Education forwarded a letter to Loudermill advising him that he had been dismissed from his employment on the ground of dishonesty. *See*: Ohio Rev. Code Ann. § 124.34 (Page 1979).[6] Loudermill was not given any opportunity prior to his dismissal to challenge its reasoning although he claimed he could have asserted a legitimate defense.[7] On November 12, 1980 Loudermill filed a notice of appeal with the Cleveland Civil Service Commission. A hearing before a commission referee originally scheduled for January 22, 1981 was postponed until January 29, 1981. On April 1, 1981 the referee filed his findings and recommendation.[8] On July 20, 1981 a hearing on Loudermill's claim was conducted before the full Cleveland Civil Service Commission which orally announced that it would affirm Loudermill's dismissal from employment. On August 10, 1981 the commission approved proposed findings of fact and conclusions of law. On August 21, 1981 Loudermill's attorneys were advised of the action by ordinary mail. Loudermill's complaint failed to allege whether he perfected any appeal to the Cuyahoga County, Ohio Court of Common Pleas as provided by Ohio Rev. Code Ann. § 124.34 (Page 1979).

[3] Donnelly is currently employed as a bus mechanic with the City of Parma Board of Education.[9] On August 17, 1977 Donnelly was advised that he was dismissed from employment because of his failure to pass an eye examination. Similar to Loudermill, Donnelly was not given a pre-dismissal hearing although he also claimed that he

could have presented a legitimate defense to his discharge.[10] On August 31, 1977 Donnelly filed a notice of appeal with the Parma Civil Service Commission. The order dismissing Donnelly, however, was not filed with the commission until September 9, 1977. Initially, the commission refused to hear Donnelly's appeal on the ground that it was not filed within ten (10) days after his dismissal order was mailed. Since Ohio Rev. Code Ann. § 124.34 (Page 1979), however, provides that the time limitation for filing an appeal to a civil service commission does not commence to run until a dismissal order is filed with the commission, Donnelly filed a complaint requesting a writ of mandamus in the Cuyahoga County, Ohio Court of Common Pleas. The writ was granted and on May 30, 1978 a hearing on Donnelly's claim was conducted by the Parma Civil Service Commission. On July 6, 1978 the commission ruled that Donnelly should be reinstated to his employment. No appeal from this decision was alleged to have been taken.

Loudermill and Donnelly claimed that Ohio Rev. Code Ann. § 124.34 (Page 1979), violates the Due Process Clause of the Fourteenth Amendment because it provides no opportunity for a classified civil service employee to respond to charges against him prior to dismissal and because classified civil service employees are not given sufficiently prompt post-dismissal hearings on appeal. The thrust of their due process claim was that the failure of the statute to provide them with a pre-dismissal hearing constituted an unconstitutional deprivation of their "property" and "liberty" interests.[11] As noted above, this court, relying on *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972); *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694 (1972); and *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633 (1974), held that although Loudermill and Donnelly did possess "property" interests in their continued employment

and "liberty" interests in their reputations, and, therefore, were entitled to some kind of due process protection regarding their dismissals, [4] their due process rights were adequately protected by the post-dismissal hearings they did in fact receive. Loudermill and Donnelly contend, however, that when OHIO REV. CODE ANN. § 124.34 (Page 1979) is analyzed under the due process standard employed by Justice Powell in his concurring opinion in *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 164, 94 S. Ct. at 1649, it is unconstitutional.[10] For the reasons which follow the court holds the plaintiffs' claim to be without merit.

Concurring in the decision reached in *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 166, 167, 94 S. Ct. at 1650, 1651, Justice Powell reasoned as follows:

> The plurality opinion evidently reasons that the nature of appellee's interest in continued federal employment is necessarily defined and limited by the statutory procedures for discharge and that the constitutional guarantee of procedural due process accords to appellee no procedural protections against arbitrary or erroneous discharge other than those expressly provided in the statute. The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of the procedural protections to which he may lay claim. It seems to me that this approach is incompatible with the principles laid down in *Roth* and *Sindermann*. Indeed, it would lead directly to the conclusion that whatever the nature of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative

> grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. *As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.*

(Emphasis added), (Footnotes omitted), (Citations omitted). Continuing his analysis Justice Powell addressed the issue of whether an evidentiary hearing must be accorded *before* an individual is discharged from public employment once it is determined that a constitutional guarantee of due process attaches to that individual's position. Justice Powell reasoned that "[t]he resolution of the issue depends on a balancing process in which the Government's interest in expeditious removal of an unsatisfactory employee is weighed against the interest of the affected employee in continued public employment." *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 167, 168, 94 S. Ct. at 1651. Examining the facts presented in *Arnett*, Justice Powell concluded that the Government's and [5] thus the public's interest, "the maintenance of employee efficiency and discipline," clearly outweighed the interest of a public employee in "the continuation of his public employment pending an evidentiary hearing." *Id.* Justice Powell gave the following three reasons in support of his conclusion: first, "[p]rolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster [sic] disharmony, and ultimately impair the efficiency of an office or agency;" second, "a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted dis-

charges;" and third, since the affected employee "would be reinstated and awarded backpay if he prevails on the merits of his claim, [his] actual injury would [only][10] consist of a temporary interruption of income. . . ." *Id.*, 416 U.S. at 168, 169, 94 S. Ct. at 1651, 1652. Comparing the situation of the public employees in *Arnett* with that of the welfare recipients in *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970), in which the Court held that an interview by a social worker, notice of the reasons in support of the termination of welfare benefits, review by a supervisor prior to such termination and a "fair hearing" after termination, was an unconstitutional deprivation of due process on the ground that the procedure deprived an eligible person of "the very means by which to live while he waits," 397 U.S. at 264, 90 S. Ct. at 1018, Justice Powell found that:

> [b]y contrast, a public employee may well have independent resources to overcome any temporary hardship and he may be able to secure a job in the private sector. Alternatively, he will be eligible for welfare benefits.

Arnett v. Kennedy, supra, 416 U.S. at 169, 94 S. Ct. 1652. Accordingly, Justice Powell concurred in the result reached in *Arnett* that a prior evidentiary hearing was not required when the employment of a public employee was terminated.

In *Matthews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976), in which the United States Supreme Court held that an evidentiary hearing is not required prior to termination of Social Security disability benefits, Justice Powell, writing for a majority of the Court, found that "the specific dictates of due process generally requires consideration of three distinct factors: first, [the] the private interest that

will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 335, 96 S. Ct. at 903. *See also: Kinsman v. Vanderbilt University*, 653 F.2d 1109 (6th Cir. 1981).

In the instant case both Loudermill and Donnelly possessed a protected "property" interest in their continued employment. The cities, on the other hand, had an interest in the safe and efficient operation of their school systems. There can be no doubt that the conclusion of six (6) members of the United States Supreme Court in *Arnett v. Kennedy*, supra, was that the governmental interest in the safe and efficient operation of governmental functions outweighs the employee's interest in continued employment prior to dismissal so that a pre-dismissal hearing is simply not required. As recently reasoned by the United States District Court for the Northern District of Mississippi in *Pinson v. Hendrix*, 483 F. Supp. 772 (N.D. Miss. 1980), *aff'd.*, without opinion, 660 F.2d 600 (5th Cir. 1981), "[t]o require the state in all cases to retain on the payroll an employee suspected of wrongdoing would amount to an administrative burden so great that the court could not achieve the proper balancing of interest." 483 F. Supp. at 778. *See also: Webb v. Dillon*, 593 F. Supp. 656 (5th Cir. 1979). Accordingly, this court affirms its prior holding that dismissal of the plaintiffs pursuant to Ohio Rev. Code Ann. § 124.34 (Page 1979), which does not provide for a pre-dismissal hearing, did not deprive them of their protected "property" interests in continued public employment without due process of law.

Similarly, the court affirms its previous holding that the post-dismissal hearings Loudermill and Donnelly received did not deprive them of their "liberty" interests in their reputations without procedural due process of law. The court so holds for two reasons: first, under the analysis provided above with regard to protected "property" interests in continued public employment, the court finds that OHIO REV. CODE ANN. § 124.34 (Page 1979) adequately protected the plaintiffs' "liberty" interests; and second, since it is necessary [7] for the purpose of establishing entitlement to due process protection of a "liberty" interest in his reputation for a plaintiff to prove that "in the course of terminating his employment, the agency prepared a report . . . which was (a) false, (b) stigmatizing, and (c) published," *Hufsttutler v. Bergland*, 607 F.2d 1090, 1092 (5th Cir. 1979), (footnotes omitted); *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155 (1976); *Codd v. Velger*, 429 U.S. 624, 97 S. Ct. 882 (1977); *Board of Regents v. Roth*, *supra*; *Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074 (1976),[14] and neither Loudermill, nor Donnelly, alleged either falsity or publication, their claims that they were deprived of their protected "liberty" interests in their reputations are facially meritless. Indeed, Loudermill merely claimed that at the time he completed his employment application, he misunderstood that he had previously been convicted of a felony. Similarly, Donnelly never claimed that his failing the eye examination was false. He merely claimed that he was wrongfully discharged because another employee, who also failed the eye examination, was not. Therefore, this court affirms its prior holding that the plaintiffs' claim that OHIO REV. CODE ANN. § 124.34 (Page 1979) deprived them of a vested "liberty" interest in their reputations without procedural due process of law is without merit.[15]

Accordingly, the plaintiffs' joint motion to alter or amend this court's previous decision is denied.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

FOOTNOTES

1. William J. Brown, the Attorney General of the State of Ohio was also named a defendant in both suits. He was so named, however, only because the constitutionality of a particular Ohio statute was challenged. None of the allegations contained in either Loudermill's or Donnelly's complaints applied to Brown and no relief was sought against him.

2. 28 U.S.C. § 1343 provides as follows:

(a) The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section -

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. OHIO REV. CODE ANN. § 124.34 (Page 1979), provides as follows:

> The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health district, and the city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute a violation of Chapter 102. of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal.
>
> In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.
>
> Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.
>
> In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officers or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.
>
> In the case of the suspension for any period of time, or demotion, or removal of a chief of police or a chief of a fire department or any member of the police or fire department of a city or civil service township, the appointing authority shall furnish such chief or member of a department with a copy of the order of suspension, demotion, or removal, which orders shall state the reasons therefor. Such order shall be filed with the municipal or civil service township civil service commission. Within ten days following the filing of such order such chief or member of a department may file an appeal, in writing, with the municipal or civil service township civil service commission.

4. In their motion the plaintiffs assert that the court erred in applying the standard of analysis employed by the United States Supreme Court in the plurality opinion in *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633 (1974) because the standard has since become that employed by Justice Powell in his concurring opinion. *See*: *Vitek v. Jones*, 445 U.S. 480, 490, 100 S. Ct. 1254, 1262 (1980); *Needleman v. Bohlen*, 602 F.2d 1, 5 (5th Cir. 1979). Since under either standard the court holds that OHIO REV. CODE ANN. § 124.34 (Page 1979), is not violative of the Due Process Clause of the Fourteenth Amendment, the plaintiffs' claim is without merit.

5. A security guard is a classified civil service employee under OHIO REV. CODE ANN. § 124.11 (Page 1980).

6. *See*: F.N. 3, *supra*.

7. In his complaint Loudermill alleged that had he been accorded a pre-termination hearing he would have asserted that he was not dishonest when he completed his employment application form because at that time, he thought he had only been convicted of a misdemeanor and not a felony.

8. Loudermill's complaint failed to specify the content of either the referees findings or recommendations. Since Loudermill's claim was subsequently heard by the full civil service commission, however, the court held this defect was of no consequence to the result reached in the case. The court finds no reasons to disturb that holding in the present opinion.

9. Accordingly, he is a classified civil servant under OHIO REV. CODE. ANN. § 124.11 (Page 1980) and, therefore can be dismissed from employment only pursuant to the provisions of OHIO REV. CODE ANN. § 124.34 (Page 1979).

10. The defense that Donnelly claimed he would have asserted was that a fellow employee who was not discharged, also failed to pass the eye examination.

11. The only difference in the two complaints is that Donnelly, in addition to the due process claim, also alleged that the statute was applied to him in a manner that allegedly violated his right to equal protection of the law. Although Donnelly alleged no facts in support of his equal protection claim, it was dismissed without prejudice on the ground that he might have possessed a state cause of action for backpay. *See*: *State ex*

rel. *Colangelo v. McFaul*, 62 Ohio St. 2d 200, 404 N.E.2d 745 (1980); *Commercial Nat'l. Bank v. Deppen*, 65 Ohio St. 2d 65, 418 N.E.2d 399 (1981); *State ex rel Kabatek v. Stackhouse*, 66 Ohio St. 2d 64, 419 N.E.2d 877 (1981). The court finds no reason to disturb that holding in the present opinion.

12. *See*: F.N. 4, *supra*.

13. Considering only the employees protected "property" interest.

14. *See also*: *Johnson v. San Jacinto Junior College*, 498 F. Supp. 555 (S.D. Tex. 1980).

15. The court also affirms its previous holding concerning the plaintiffs' claims that OHIO REV. CODE ANN. § 124.34 (Page 1979) fails to provide for prompt appellate hearings. No further comment on this issue is necessary.

JUDGMENT ENTRY OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed November 17, 1983)

No. 82-3226/82-3227

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES LOUDERMILL,
Plaintiff-Appellant,

v.

CLEVELAND BOARD OF EDUCATION, *et al.*,
Defendants-Appellees.

RICHARD DONNELLY,
Plaintiff-Appellant,

v.

PARMA BOARD OF EDUCATION, *et al.*,
Defendants-Appellees.

JUDGMENT ENTRY

Before: MERRITT, WELLFORD and TIMBERS, Circuit *Judges.*

ON APPEAL from the United States District Court of the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of

the said District Court in this cave be and the same is hereby affirmed in part; vacated and remanded in part.

Each party is to bear his own costs.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

OPPOSITION BRIEF

No. 83-1362

SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE CLEVELAND BOARD OF EDUCATION

Petitioner

- vs -

JAMES LOUDERMILL

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

The decision of the Court of Appeals concerning the Respondent's pretermination rights is consistent with this Court's position in Arnett v. Kennedy, 416 U.S. 134 (1974), wherein a majority held that at least at least some pretermination procedures must be provided, if not a full evidentiary hearing.

The Court of Appeals also made a thorough and appropriate evaluation of the three factors in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), in determining that some pretermination procedures are required prior to the discharge of a civil service employee.

ARGUMENT

The Court of Appeals decision affording the Respondent pre-termination due process rights is not contrary to this Court's precedent, but is consistent therewith. A majority of this Court in Arnett v. Kennedy, supra, held that some pretermination procedures are required even if a full evidentiary hearing is not required until after the termination. The procedures included in the statute involved in Arnett v. Kennedy, supra, were more comprehensive than those contained in Ohio Revised Code Section 124.34, and unlike the Ohio statute, provided pretermination procedures. As stated therein by Justice Powell in his concurring opinion on page 170:

> "Appellee also argues that the absence of a prior evidentiary hearing increases the possibility of a wrongful removal, and that delay in conducting a post-termination evidentiary hearing further aggravates his loss. The present statute and regulations, however, already respond to these concerns. The affected employee is provided with 30 days advance notice of the reasons for his proposed discharge and the materials on which the notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to his case. After removal, the employee receives a full evidentiary hearing and is awarded backpay if reinstated. See 5 CFR 771.208 and 772.305; 5 U.S.C. 5596. These procedures minimize the risk of error in the initial removal decision and provide for compensation for the affected employee should that decision eventually prove wrongful."

The fact that Arnett requires some pretermination procedures is fully supported by the case of Thurston v. Dekle, 531 F. 2d 1284 (C.A.5, 1976), wherein the Circuit Court dealt with a removal statute that, like the Ohio statute, provided only a

post-removal appeal. The Circuit Court held that although a full evidentiary hearing was not required prior to removal, that, nevertheless, certain pre-removal procedures were required based upon Arnett v. Kennedy, supra.

The Circuit Court further held that the plaintiffs could not recover their backpay, because such payments would have to be made from the city treasury, and municipalities were not "persons" pursuant to the federal civil rights act.

This Court granted certiorari, and then vacated the Circuit Court judgment for reconsideration, 438 U.S. 901 (1978), based solely upon the case of Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), which held that municipalities were "persons" pursuant to said act. The Circuit Court's judgment was not vacated because of its holding that the case of Arnett v. Kennedy required some pretermination procedures.

Also see the case of Oregon State Penitentiary v. Hanner, 556 P. 2d 1348, 276 Or. 65 (1976), wherein the Oregon Supreme Court held that some form of pre-termination procedures are required before a public employee could be removed for excessive absences. Certiorari was granted by this Court, and the judgment was vacated for reconsideration in light of Dixon v. Love, 431 U.S. 105 (1977), which held that driver's licenses could be summarily revoked after a certain number of traffic violations. See 434 U.S. 945. Upon remand, 583 P. 2d 1136, 1138, the Oregon Supreme Court made a comparison between the case before them and Dixon v. Love, supra, concerning the factors enumerated in Mathews v. Eldridge, 424 U.S. 319 (1976), and concluded that the Dixon case supported their holding that some from of pretermination procedures are required rather than contradicting it. The case was again taken back to this Court, but certiorari was then denied. 440 U.S. 935.

Accordingly, the Court of Appeals decision herein is not in conflict with the opinions of a majority of this Court in the case of Arnett v. Kennedy.

This Court did not hold in Boehning v. Indiana State Employees Association, 423 U.S. 6 (1975), that a pretermination hearing is only required when the state statute calls for such a hearing. Said principle is the same principle that was rejected by a majority of this Court in Arnett v. Kennedy, supra. See Vitek v. Jones, 445 U.S. 480, 490-491, n. 6 (1980). This Court in Boehning, supra, remanded the case to the state court to determine if the state statute already required the hearing demand by the petitioner, so that a decision on the federal constitutional question could be avoided.

The Court of Appeals herein made a sufficient evaluation of

the factors required to be considered in Mathews v. Eldridge, supra, p. 335, in determining that due process requires some pre-termination procedures. Even if an emergency situation existed, which this Respondent denies, since the felony conviction was more than 12 years prior to his termination, and he was employed for a year with no incidents, the Respondent could have been temporarily suspended for a short time while he was granted pre-termination due process procedures. Also, contrary to the contentions of the Petitioner, the statute involved in Mathews v. Eldridge, supra, provided no pre-termination evidentiary hearings, but the affected individuals were still permitted to submit written documents prior to the termination of their benefits.

This Court held in Parrott v. Taylor, 451 U.S. 527 (1981), that pretermination procedures are not always required. However, the denial of a pretermination hearing can only be justified when such a hearing is impractical or there is necessity for quick action - neither of which were warranted in this case.

Petitioner's statement, page 11, that the Respondent never contested the reasons for his termination is incorrect. In fact, he had protested very vigorously before the Referee. As the Court of Appeals stated in their opinion (page A24 of Petitioner Appendix):

> "For example, in the instant case, Loudermill could have presented his defense of good faith mistake - that he did not know that he had been convicted of a felony. The conviction occurred twelve years earlier. Perhaps through negotiations he thought a misdemeanor charge had resulted. Even if clearly wrong, he should have been afforded the chance to respond; for he was dismissed not because of the prior conviction per se, but because of alleged dishonesty ..."

Both of the lower courts held that the Respondent had a property interest protected by due process in his employment,

(see A37 and A19 of Petitioner's Appendix)

and such factual findings are not clearly erroneous as to warrant this Court to hold otherwise.

Further, since the due process requirements are determined by federal law, Vitek v. Jones, supra, p. 491, this Court is not bound by the Ohio Supreme Court decision of Parfitt v. Columbus Correctional Facility, 62 Ohio St. 2d 434 (1980) to the effect that pre-termination procedures are not required.

The Court of Appeals decision herein is not contrary to other federal Circuit Court cases as contended by Petitioner. The court in Jackson v. Stinchomb, 635 F. 2d 462 (C.A.5, 1981), did not hold that no pretermination procedures are required if there is a sufficient post-termination hearing provided. Rather, the Fifth Circuit held that if the district court has found that federal due process was violated due to the failure to provide

any pretermination procedures, then in that event reinstatement was required only until a state hearing is held, or that back pay is only justified for the time period between the date of the termination and the date of the state hearing. Like the Respondent, the employee in Jackson v. Stinchomb, supra, could not have been terminated under state law for the felony conviction itself, see Ohio Administrative Code Section 124-3-04(A).

The case of Cierchon v. Chicago, 634 F 2d 1055 (C.A. 7, 1980), can be distinguished from the present case since it dealt with a suspension pending a termination hearing, while the Respondent was summarily terminated. It should be noted that the circuit Court in Cierchon v. Chicago, supra, remanded the case to the district court for a determination as to whether or not the promptness requirement of Barry v. Barchi, 443 U.S. 55 (1979), was complied with. The time involved between notice of the disciplinary action and the hearing was approximately one half the time involved in the present case.

In Bullock v. Mumford, 509 F. 2d 384, 386-387 (C.A. D.C., 1974), the employees were first suspended then terminated for demonstrating while on working time and after they were told that the failure to return to work would cause them to be considered "A.W.O.L." Since there were no factual issues, the lack of a hearing cannot be considered as a denial of due process. See Hortonville District v. Hortonville Education Association, 426 U.S. 482, 494 (1976).

The case of Webb v. Dillon, 593 F. 2d 656 (C.A. 5, 1979) is not inconsistent with the Court of Appeals opinion herein because the employee had at least two (2) conferences prior to his termination. Also, the same circuit Court has subsequently held that pretermination procedures must be provided when there are factual issues involved. See Gosney v. Sonora Independent School District, 603 F. 2d 522, 525 (C.A. 5, 1979); and Jones v. Orleans Parish School Board, 679 F. 2d 32, 36-37 (C.A. 5, 1982). The Court of Appeals on page 562 of its opinion found factual disputes in both cases, and neither finding is clearly erroneous as to warrant this Court to hold otherwise.

CONCLUSION

The Respondent's interest in continued employment is at least as substantial as the right to an education involved in Goss v. Lopez, 419 U.S. 565 (1975). See Logan v. Zimmerman Brush Co., et al., 455 U.S. 426, 431 (1982). Therefore, a terminated public employee, like a suspended high school pupil, is entitled to some predeprivation procedures, and the Court of Appeals decision herein regarding such procedures was not contrary to law and is consistent with precedent of this Court and other federal circuit courts.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

CASE NOS. 83-1362, 83-1363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Office - Supreme Court, U.S.
FILED
MAR 14 1984
ALEXANDER L. STEVAS
CLERK

CLEVELAND BOARD OF EDUCATION,
Petitioner,

v.

JAMES LOUDERMILL,
Respondent.

PARMA BOARD OF EDUCATION,
Petitioner,

v.

RICHARD DONNELLY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF OHIO AND SEVEN OTHER STATES IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT MANDATE THE PRESENCE OF PRE–TERMINATION PROCEDURES WHERE A STATE STATUTE PROVIDES A DISCHARGED CLASSIFIED CIVIL SERVICE EMPLOYEE WITH NOTICE OF DISCHARGE AND AN OPPORTUNITY TO BE HEARD IN A POST–TERMINATION HEARING?

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CASE NOS. 83–1362, 83–1363

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CLEVELAND BOARD OF EDUCATION,
Petitioner,

v.

JAMES LOUDERMILL,
Respondent.

PARMA BOARD OF EDUCATION,
Petitioner,

v.

RICHARD DONNELLY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE, STATE OF OHIO, IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI

Amicus, State of Ohio, pursuant to Supreme Court Rule 36.4, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on November 17, 1983, in *Loudermill v. Cleveland Board of Education*, 721 F. 2d 550 (6th Cir. 1983).

STATEMENT OF INTEREST

This case requires the Court to finally resolve the uncertainty precipitated by its plurality decision in *Arnett v. Kennedy*, 416 U.S. 134 (1974), as to the scope of procedural due process necessary to protect governmental employees' federally-or state-created property interests.

In its opinion, the United States Court of Appeals for the Sixth Circuit held that the Cleveland and Parma, Ohio, Boards of Education failed to provide their employees due process of law when they were not afforded an opportunity to present evidence prior to their discharges, even though the employees had notice of the discharges and an opportunity to be heard in post-termination hearings pursuant to Section 124.34 of the Ohio Revised Code.

Section 124.34, which provides a comprehensive mechanism for an appeal by public employees in Ohio who are reduced in pay or position, suspended or discharged, applies to all persons in the classified civil service of the State, including all counties, civil service townships, cities, city health districts, general health districts and school districts. Consequently, the Court of Appeals' opinion affects not only the parties in these cases, but will have a far-reaching impact on all disciplinary actions taken by the State of Ohio and its political subdivisions.

The court below has sought to impose upon the State of Ohio the burden of providing pre-termination process outside the procedural requisites of the Fourteenth Amendment. Such a result would allow for an overly-broad application of procedural due process in

derogation of its dictates, as defined by a balancing of both the governmental and private interests involved. For this reason, the amicus, by virtue of its authority in effectively administering its statewide classified civil service employment scheme, has a substantial interest in the resolution of the question presented in the instant case.

SUMMARY OF ARGUMENT

The opinion of the United States Court of Appeals for the Sixth Circuit is in direct contravention of the principles enunciated by this Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). As an attempt to broaden the scope of procedural due process as defined by this Court, the Court of Appeals has sought to totally disregard settled precedent supporting the constitutional propriety of state statutes, which provide solely for post-termination process following discharge of a classified governmental employee. Not only does the analysis of the court below raise substantive inconsistencies in comparison with other federal circuit courts, it ignores a state adjudication of the constitutionality of Section 124.34 of the Ohio Revised Code; under such analysis, the Court of Appeals indirectly labels the state statute unconstitutional. In so doing, the opinion of the court below raises a federal constitutional question that can only be resolved by review in this Court. It is imperative that this Court grant certiorari in the instant case in order to rectify the divergence of opinion resulting from this Court's decisions in *Arnett* and its progeny, and to bring the result of this case into compliance with the result of *Scherer v. Davis*, 543 F. Supp. 4 (N.D. Fla. 1982), *aff'd without opinion*, 710 F. 2d 838 (11th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3449 (December 12, 1983) (No. 83-490), a factually and legally analogous case which the Court presently has before it.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS MANDATES AN UNCONSTITUTIONALLY BROAD APPLICATION OF PROCEDURAL DUE PROCESS IN DIRECT CONFLICT WITH THE MEASURE OF DUE PROCESS DEFINED BY THIS COURT IN SAFEGUARDING PROPERTY INTERESTS IN CONTINUED EMPLOYMENT.

A. The Opinion Of The Court Below Is Contrary To Decisions Of This Court In That This Court Has Never Interpreted The Due Process Clause Of The Fourteenth Amendment To Require A Pre-Termination Hearing For A Classified Governmental Employee.

The result envisioned by the Court of Appeals contradicts the principles announced by this Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974) and its progeny.

In *Arnett*, the Court considered a federal statute somewhat similar in scope to Section 124.34 of the Ohio Revised Code, which provides a classified employee discharged for cause with the right to notice and a post-termination hearing.[1] The plurality in *Arnett* noted that

---

[1] Section 124.34 of the Ohio Revised Code provides in pertinent part:

> The tenure of every officer or employee in the classified service of the state and the counties . . . holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in Section 124.32 of the Revised Code, and for

"where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right," the substantive right cannot be viewed independently from the procedural mechanism which enforces it. *Id.* at 153-154. As such, the Due Process Clause requires nothing outside of compliance with the requisite statutory procedures in order to satisfy the dictates of the Fourteenth Amendment. *Id.* at 151-154. Since the Court of Appeals seeks to broaden the application of the Due Process Clause to include the requirement of additional procedures not provided by Section 124.34, which grants the substantive right in the instant case, it is inconsistent with this Court's analysis in *Arnett*.

---

[1] cont.

> incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections of the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute a violation of Chapter 102. of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal.
>
> In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.

A myriad of pronouncements from this Court following the *Arnett* decision belie the finding of the court below. In its most recent decision concerning the scope of procedural due process, this Court reiterated its stance that the presence of adequate post-termination protections pretermits the need for pre-deprivation procedures. *Parratt v. Taylor*, 451 U.S. 527 (1981). Contrary to the holding of the Court of Appeals, the necessity of providing a hearing at "a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545 (1965), has never been interpreted to translate into a requirement for a hearing prior to the deprivation of a property interest. 451 U.S. at 540-541. When "the necessity of quick action by the state or the impracticality of providing any meaningful pre-deprivation process [is] . . . coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking. . .," procedural due process is satisfied and its substantive guarantees left intact. 451 U.S. at 539 (footnote omitted).

---

[1] cont.

> Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.
>
> In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code. . . .

The crux of this Court's procedural due process analysis stems from its decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Unlike the instant case, *Mathews* involved a situation in which the right to obtain social security benefits was conveyed absent an intertwined procedural mechanism for its adjudication. In determining the measure of process due in such instances, this Court predicated the need for due process upon the following factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest absent a pre-termination hearing; (3) the possible value of additional or substitute procedural safeguards, and (4) the governmental interest in efficiently effecting the deprivation. 424 U.S. at 334-335. On balance, the Court emphasized the minimal risk of an erroneous deprivation absent a prior evidentiary hearing due to the medical documentation required to substantiate cause for termination of social security disability benefits.

In light of the facts herein, the Court of Appeals has incorrectly applied the opinion in *Mathews* and precipitated an outcome contrary to this Court's pronouncements on the scope of procedural due process. Both respondents in the case at bar were dismissed for cause: Donnelly's termination was predicated upon medical documentation; Loudermill's discharge was based upon his prior criminal record. Because the discharges were engendered by independent documentation indicative of "just cause," the situation presented is analogous to that considered by this Court in *Mathews*; thus, the same result must prevail, and the Court of Appeals opinion runs contrary to that result.[2]

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[2] This Court has only required the presence of a pre-deprivation hearing in one instance. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), it was

B. The Opinion Of The Court Of Appeals Is In Conflict With Decisions Of Other Circuit Courts And The Supreme Court Of Ohio.

First and foremost, the decision of the court below is directly contrary to the decision of the Supreme Court of Ohio in *Parfitt v. Columbus Correctional Facility*, 62 Ohio St. 2d 434, 406 N.E. 2d 528, *cert. denied*, 449 U.S. 1061 (1980).

In resolving a challenge analogous to the one raised in the case at bar as to the constitutionality of Section 124.34, the Supreme Court of Ohio, relying on this Court's decision in *Arnett v. Kennedy*, *supra*, determined that a pre-termination hearing was not constitutionally required. The court noted further that *Arnett* approved a procedure "essentially the equivalent of the one provided for classified employees in R.C. Chapter 124." 62 Ohio St. 2d at 438.

Though the Court of Appeals does not declare outright that Section 124.34 is constitutionally defective, the opinion makes an indirect adjudication as to the constitutionality of the statute by averring:

---

[3] cont.

determined that the denial of welfare benefits would "deprive an eligible recipient of the very means by which to live." *Id.* at 264. However, the Court specifically enunciated the inapplicability of such a maxim to the case of a discharged government employee, *id.* at 263-264, and has since failed to apply such an extreme requirement to the other cases it has considered concerning the scope of procedural due process. *See e.g., Mackey v. Montrym*, 443 U.S. 1 (1979) (suspension of a driver's license without a pre-suspension hearing deemed procedurally sufficient under Due Process Clause of the Fourteenth Amendment).

> We recognize that the Ohio Supreme Court has held that no pre-termination process is constitutionally required. *Parfitt v. Columbus Correctional Facility*, *supra* note 13, 62 Ohio St. 2d at 438, 406 N.E. 2d at 531. We of course are not bound by that court's constitutional adjudication.

721 F. 2d at 560. By stating such, the Court of Appeals has, in effect, cast doubt upon the constitutionality of Section 124.34. For this reason, certiorari should be granted to resolve the federal question presented by the constitutionality of the termination procedures provided for in Section 124.34 of the Ohio Revised Code.

The Court of Appeals opinion is also in conflict with the decisions of other federal circuits. At least three circuits have upheld the adequacy of post-termination procedures absent the provision of a pre-termination proceeding. In *Bullock v. Mumford*, 509 F. 2d 384 (D.C. Cir. 1974), the circuit court declared that in light of the precepts announced in *Arnett*, the absence of a hearing in advance of separation is not, in and of itself, constitutionally defective. The Court of Appeals for the Seventh Circuit, in *Ciechon v. City of Chicago*, 634 F. 2d 1055 (7th Cir. 1980), carried this caveat one step further by applying the balancing test enunciated in *Mathews* to find that the need for a pre-suspension hearing was pretermitted by the presence of adequate post-termination procedures.

Finally, in *Webb v. Dillon*, 583 F. 2d 656 (5th Cir. 1978), the Fifth Circuit upheld the constitutional propriety of Georgia's termination provisions for court employees. Though the Georgia statute did not provide

for any pre-termination opportunity to respond, it did require notice of discharge, a ten-day time limit for appealing to a civil service board, and a post-termination hearing, very much like the procedures enunciated in Section 124.34.

Several other courts of appeals, however, in addition to the Court of Appeals in this case, have reached opposite conclusions on the same issue of federal law. *See Vanelli v. Reynolds School District No. 7*, 667 F. 2d 773 (9th Cir. 1982); *Louise B. v. Colusetti*, 606 F. 2d 392 (3rd Cir. 1979); *Scherer v. Davis*, 543 F. Supp. 4 (N.D. Fla 1982), *aff'd without opinion*, 710 F. 2d 838 (11th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3449 (U.S. December 12, 1983) (No. 83-490).[3] There even seems to be a conflict

[3]The case of *Scherer v. Davis*, in which this Court has recently granted certiorari, presents an analogous attack on the constitutionality of post-termination provisions absent pre-termination process. In *Scherer*, the discharged employee was given written notice of his discharge after its effective date; was not provided with an opportunity to respond to the charges against him prior to his termination, and did not receive a prompt post-termination hearing, all of which are consistent with normal state procedures in Florida.

If anything, Section 124.34 provides more procedural safeguards to its discharged classified employees. Written notice of discharge stating the reasons in support thereof is provided prior to or contemporaneous with termination; there is a right to appeal within ten (10) days of receipt of notice and a right to a full evidentiary hearing within thirty (30) days of the filing of the appeal. Additionally, Ohio's statute, unlike its Florida counterpart, allows for the reimbursement of back pay should a finding be made of dismissal without just cause.

Since *Scherer* and the instant case are similar in both fact and law, reversal by this Court of the *Scherer* decision would mandate reversal of the decision of the Court of Appeals below, especially in light of the fact that Florida's statute occasions more limited procedural protections than afforded by Section 124.34. For this reason alone, this Court is constrained to grant certiorari in the case at bar.

within one individual circuit as to the necessity and degree of pre-termination process required. *Compare Glenn v. Newman*, 644 F. 2d 467 (5th Cir. 1980) and *Thurston v. Dekle*, 531 F. 2d 1264 (5th Cir. 1976), *vacated and remanded on other grounds*, 438 U.S. 901 (1979) and *Gosney v. Sonora Independent School District*, 603 F. 2d 522 (5th Cir. 1979).

Due to the discrepancy among the circuits as to whether a pre-termination hearing is constitutionally required for a discharged classified employee, who is already statutorily entitled to pre-termination notice and a prompt post-termination hearing, this Court must grant certiorari in order to rectify and resolve the split in opinion occasioned by *Arnett* and its progeny.

C. The Right To A Prompt Post-Termination Hearing As Provided By Ohio Law Comports With That Measure Of Process Due A Discharged Classified Employee.

Section 124.34 of the Ohio Revised Code grants classified civil service employees a property interest in continued employment absent cause for discharge. *Jackson v. Kurtz*, 65 Ohio App. 2d 152, 157-158, 416 N.E. 2d 1064 (1979). The interest conveyed, however, is a limited one subject to certain restrictions, both in substance and procedure. Violation of any of the substantive provisions constitutes cause for removal. Once "cause" has been established, protection of the property interest that arises is provided for through the grant of a full evidentiary hearing before the State Personnel Board of Review. As such, Section 124.34 creates a statutory right similar to that invoked in *Arnett*, wherein the

interest created is not solely "a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedure which [the State] has designated for the determination of cause." 416 U.S. at 152. In other words, as the Sixth Circuit noted in its decision below, Section 124.34 "limits an employee's right to a full evidentiary hearing after discharge at the same time that it first vests the property right to continuing employment. . . ." *Loudermill v. Cleveland Board of Education*, 721 F. 2d 550, 560 (6th Cir. 1983). Since the property right defined in Section 124.34 is not absolute, but is limited by the availability of a post-deprivation hearing procedure, nothing more is required under the Due Process Clause. *Arnett*, 416 U.S. at 151-154.

Under Section 124.34, a discharged employee is given ample opportunity to present his case. After being fully notified in writing as to the reasons for the discharge prior to or concomitant with actual termination, the employee has the right to appeal the adverse ruling against him. An independent trial board is appointed to hear the appeal within thirty days from the filing of the appeal, and further appeals may be had through the State court system. Because the statute's application is conditioned upon the establishment of cause for removal, the risk of an erroneous deprivation is minimal. In any event, should a finding be made of dismissal without just cause, the affected employee is entitled to reinstatement and back pay.

This is not a case in which the State seeks to arbitrarily abrogate the benefits it creates without affording some measure of due process; such action would be in total derogation of constitutional guarantees. *See Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Rather, applica-

tion of this Court's analysis in *Mathews* indicates that a balance has been struck between the State's interest in expeditious removal of an unsatisfactory employee and the interest of the affected employee in continued public employment. The balance minimizes wrongful termination by assuring the opportunity for a prompt post-deprivation hearing, while unburdening the State from the administrative burdens of providing elaborate pre-termination proceedings for an employee for whom cause for discharge has been shown.

The Court has always adhered to the premise that procedural due process is very much a creature of circumstance, analyzed and applied on a case-by-case basis. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972); *Arnett v. Kennedy*, 416 U.S. at 167-168. As this Court has indicated in the past:

> When prompt post-deprivation review is available for correction of administrative error, we have generally required no more than that the pre-deprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.

Mackey v. Montrym, 443 U.S. at 13. It is evident, therefore, that this Court's interpretation of the flexible standard of due process does not include a mandate for the presence of a pre-termination hearing, where protection of the private interests involved has been accorded through adequate post-deprivation proceedings. Since

the court below failed to properly apply this Court's pronouncements regarding procedural due process to the facts stated herein, this Court must grant certiorari to rectify the improper interpretation of its decisions.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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RESPONDENT'S

BRIEF

83-6392

83-6392

Office - Supreme Court, U.S.
FILED
APR 12 1984
ALEXANDER L. STEVAS,
CLERK

Case No. 83-1362

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

JAMES LOUDERMILL

Cross-Petitioner

-vs-

THE CLEVELAND BOARD OF EDUCATION, et al.

Cross-Respondents

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

BRIEF IN OPPOSITION OF CROSS-RESPONDENT CLEVELAND CIVIL SERVICE COMMISSION

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983
No. 83-1362

JAMES LOUDERMILL

Cross-Petitioner

-vs-

THE CLEVELAND BOARD OF EDUCATION, et al.

Cross-Respondents

BRIEF OF CROSS-RESPONDENT CLEVELAND CIVIL SERVICE COMMISSION IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

QUESTIONS PRESENTED

1. Whether the Court below correctly held that a period of of less than nine months in which to hear and consider the appeal of a discharged employee is not so excessive as to constitute a denial of due process of law?

2. Whether a question as to alleged dissemination of references concerning an employee's honesty may be considered by this

Court when such question has not been raised before the Court of Appeals below?

FACTS

The relevant facts herein are uncontroverted. However, in describing the time during which his appeal was pending before the Cleveland Civil Service Commission, cross-petitioner consistently refers to the so-called nine-month "delay" before his appeal was "completed". This characterization unnecessarily confuses the issues before the Court, and accordingly, a chronological review of the relevant events may be helpful.

(1) November 12, 1980, Cross-petitioner's Notice of Appeal to the Civil Service Commission was filed. (Opinion of Manos, J., Appendix of Petitioner at A52.

(2) January 22, 1981, a hearing was scheduled before a referee appointed by the Commission pursuant to Ohio Rev. Code Sec. 124.34, but was continued. (Id.)

(3) January 29, 1981, a hearing was held before the referee. (Id.)

(4) April 1, 1981, the referee filed his Report and Recommendation with the Civil Service Commission (Id.), in which he recommended that cross-petitioner be reinstated. The appointing authority, petitioner herein, objected to that Report and Recommendation, and accordingly, an appeal was perfected to the full Civil Service Commission. (Cross-petition, at 2).

(5) July 20, 1981, a hearing was held before the full Civil Service Commission, which then orally announced that it would affirm the dismissal of cross-petitioner. (Opinion of Manos, J., Appendix of Petitioner, at A52).

(6) August 10, 1981, the Civil Service Commission approved the findings of fact and conclusions of law affirming the discharge of

the findings of fact and conclusions of law affirming the discharge of cross-petitioner. (Id.)

(7) August 21, 1981, cross-appellant's attorneys were notified of the Commission's action by ordinary mail. The record discloses no appeal therefrom. (Id.)

Cross-petitioner considers the total period from the date his Notice of Appeal was filed (November 12, 1980) until the date of notification of the Commission's action (August 21, 1981), then complains that the cross-respondent, the Cleveland Civil Service Commission, deprived him of due process by interposing a nine-month "delay" before his appeal was "completed". It is submitted that the facts clearly establish otherwise.

Analyzing the several stages of the cross-petitioner's appeal to the Civil Service Commission, it is evident that the Commission considered that appeal and appointed a referee to hear it, and that

the hearing was held and a Report and Recommendation issued, all within twenty weeks of the filing of the Notice of Appeal. The balance of the so-called "delay" was occasioned by the subsequent objections to the Report and Recommendation filed by the appointing authority, the Petitioner herein. Furthermore, the record discloses that the decision of the Commission, to affirm the discharge of cross-petitioner, was made and announced at its meeting July 20, 1981, one month before the date referred to by cross-petitioner. The additional month was needed to comply with formal requirements as to preparation and adoption of findings of fact and conclusions of law and a vote approving the minutes thereof. 1/

1/ In fact, with administrative appeals available under Ohio law (Rev. Code Sec. 124.34), the appeal was not "completed" even then, but could have continued through Ohio courts for years thereafter.

REASONS FOR DENYING THE WRIT

I

The Courts Below Properly Found That A Period Of Less Than Nine Months Is Not An Excessive Time In Which To Hear, Consider, And Rule Upon An Administrative Appeal From Termination From Public Employment.

The case law submitted by cross-petitioner utterly fails to provide any support for his contention that the nine months between the filing of his Notice of Appeal and the decision of the Civil Service Commission affirming his discharge constituted a denial of a prompt post-termination remedy and thus, a denial of due process of law.

While it is conceded that a person may have a property right in his continued employment, and that even an inadvertent denial of due process may be actionable, cross-petitioner has provided no argument and no precedent to support his contention that the time during which his appeal was before the Civil Service Commission constituted such a denial. Those cases which he has cited,

without exception, either are distinguishable on their facts or actually contradict cross-petitioner's own arguments.

Arnett v. Kennedy, 416 U.S. 134 (1975), like the present case, concerns a post-termination hearing for a discharged employee. The Court held that a period of three months to affirm that discharge was not excessive.

Fusari v. Steinberg, 419 U.S. 379 (1975) concerned a hearing as to termination of unemployment benefits. Mathews v. Eldridge, 424 U.S. 319 (1976) involved a hearing as to termination of Social Security Disability benefits. [2] Goldberg

---

[2] Cross-petitioner concedes that this Court held in Mathew, supra, that: ... a ten to eleven month delay in affording post termination hearings was not excessive." Cross-petition, at 3. Actually, as the Court stated in Mathew, supra, at 342, "Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after hearing exceeds one year." Emphasis added.

v. Kelly, 397 U.S. 254 (1970) arose from a termination of welfare benefits. In all three cases, the Court noted the draconian effect of the loss of benefits upon the recipient. As the Court commented in Goldberg, supra, at 264:

> (T)he crucial factor in this context--a factor not present in the case of ... the discharged government employee ... -- is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.

This language was cited with approval in Arnett vs. Kennedy, supra, concurring opinion of Powell, J., at 169 in which he observed that a discharged public employee, unlike a terminated welfare recipient, may have independent resources to see him through the period of his appeal, may be able to secure alternative private-sector employment, and as a last resort may be eligible for welfare benefits. Thus, this Court has made it clear consistently that the

need for a prompt disposition of an appeal is substantially greater in cases involving termination of government benefits than in those involving termination of government employment--contrary to the argument proposed by cross-petitioner. If one year or more is not an excessive period for consideration of an appeal of termination of disability benefits, certainly less than nine months is not an impermissibly long period for a multi-stage appeal process as to discharge from public employment.

Petitioner notes, at 14, that this Court recently granted certiorari, "... to consider the constitutionality of similar pre-termination and post-termination procedures for Florida Civil Service employees." Scherer v. Davis, 523 F.Supp. 4 (N.D. Florida 1981), affirmed without opinion, 710 F.2d 838 (11th Cir. 1983), cert. granted sub nom. Davis v. Scherer, Case No. 83-490, 52 U.S.L.W. 3449 (December 12, 1983).

Cross-petitioner also cites Scheuer, but in support of his request that this Court "...take judicial notice that the issue of the unconstitutional delay in the disposition of post-termination appeals was accepted for review. ..." Cross-respondent submits that this is an inaccurate and misleading characterization of Scheuer. In that case, the District Court had before it Sec. 119.061, Florida Statutes (1977), together with its implementing rules, which it found to be unconstitutional:

> ...insofar as (1) they fail to mandate pre-termination procedures which safeguard the rights of employees, (2) they fail to provide a prompt post-termination hearing, and (3) they fail to guarantee back pay to an employee deemed

> to have been dismissed without just cause...[7]

With respect to the post-termination procedures at issue here, there has been no suggestion that the Ohio statute, Rev. Code Sec. 124.34, fails to provide a prompt post-termination hearing. To the contrary, the substance of the cross-petition is the assertion, at 3, that cross-petitioner's appeal "... was not completed until nine (9) months after his notice of appeal was filed." Emphasis added. Furthermore, cross-petitioner concedes that this length of time exceeded the time in which Ohio Rev. Code Sec. 124.34 directs that such appeal be heard.

---

[7] Unlike the Florida statute before the Court in Scheuer, supra, cross-respondent notes that under Ohio law an employee who has been wrongfully discharged is entitled to reinstatement with all back pay and benefits restored. State, ex rel. Colangelo v. McFaul, 62 Ohio St. 2d 280 (1980); State, ex rel. Hamlin v. Collins, 65 Ohio St. 63 (1981); State, ex rel. Kabatek v. Stackhouse, 66 Ohio St. 2d 64 (1981).

Gibson v. Berryhill, 411 U.S. 564, 575, n.14 (1973), cited by cross-petitioner as supporting his contention that "administrative proceedings have been held to be unconstitutional because of excessive delays," in fact holds only that excessive delays by an administrative agency may make such remedies inadequate so as to obviate the exhaustion requirement. He cites that case further, supra, at 577, for the proposition that he "... had a right to have his appeal timely decided by the Commission." That citation, however, merely holds that abstention pursuant to Younger v. Harris, 401 U.S. 37 (1971):

> ... contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts. Such a course naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved.

Cross-petitioner's reliance upon Barry v. Barchi, 443 U.S. 55 (1979), is similarly misplaced, in that that case dealt with the suspension of a horse trainer by the New York State Racing and Wagering Board, in which by statute the trainer had no means by which to challenge his suspension until the disciplinary action had become final. By contrast, however, and as noted by the Court of Appeals herein (Appendix of Petitioner, at A29), Ohio Rev. Code Sec. 124.34 provides a mechanism for prompt review. If the period required for such review exceeded the time provided by statute, cross-petitioner clearly had a right to petition in mandamus or procedendo in order to expedite that process.

Cross-petitioner argues that the availability of mandamus "... does not alleviate the government's responsibility of providing individuals with basic due process requirements where deprivation of life, liberty or property are in-

volved," citing Mennonite Board of Missions v. Adams, _____ U.S. _____, 103 S.Ct. 2706, 2712 (1983). Clearly, on its facts that case is totally inapposite here. The constitutional obligation there was the duty to provide notice to a creditor of an impending tax sale; the Court held that neither notice by publication and posting nor mailed notice to the property owner is sufficient to give the mortgagee actual notice, where the owner is not in privity with his creditor and has failed to take steps necessary to protect his own interests. Here, to the contrary, cross-petitioner was aware throughout the proceedings of his status and of what remedies were available to him. He may not simply rest upon his rights and allow time to pass, then complain that the passage of time violated those rights.

II

The Question Of Alleged Dissemination Was Not Raised Before The Court Of Appeals And Is Not Supported By The Record Before This Court And Thus Should Not Be Considered Here.

Cross-respondent, Cleveland Civil Service Commission, submits that the second question proposed for review in the cross-petition is not properly before this Court, in that it is not set forth in the record below and thus, is not subject to review.

Furthermore, the record below does disclose that, ultimately, cross-petitioner was terminated on the basis of the charges brought against him, and fails to show any appeal therefrom. Accordingly, and cross-petitioner's protestions to the contrary notwithstanding, any references to his honesty which may have been made were both proven and justified by a judgment which was not appealed, and which this is now final.

Finally, there is nothing in the cross-petition alleging that any such references were disseminated by the cross-respondent Cleveland Civil Service Commission. Cross-petitioner has not given any basis for any claimed liability for such alleged references, and it is submitted that none exists.

CONCLUSION

The cross-petition for writ of certiorari should be denied.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

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FILED
JUL 12 1984
ALEXANDER L. STEVAS,
CLERK

CASE NOS. 83-1362, 83-1363

In The Supreme Court of the United States

OCTOBER TERM, 1983

CLEVELAND BOARD OF EDUCATION,
Petitioner,

v.

JAMES LOUDERMILL,
Respondent.

PARMA BOARD OF EDUCATION,
Petitioner,

v.

RICHARD DONNELLY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE STATE OF OHIO AND NINETEEN OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT MANDATES THAT A STATE PROVIDE ITS CLASSIFIED CIVIL SERVICE EMPLOYEES WITH THE OPPORTUNITY FOR A HEARING PRIOR TO DISCHARGE FOR CAUSE WHEN THE EMPLOYEES' RIGHT TO PROCEDURAL DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT IS ALREADY FULLY PROTECTED AND CONVEYED BY STATUTE IN THE FORM OF WRITTEN NOTICE OF DISCHARGE AND THE REASONS THEREFOR AND THE RIGHT TO A DE NOVO POST-TERMINATION HEARING.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NO. 83-1362

CLEVELAND BOARD OF EDUCATION,
Petitioner,

v.

JAMES LOUDERMILL,
Respondent.

NO. 83-1363

PARMA BOARD OF EDUCATION,
Petitioner,

v.

RICHARD DONNELLY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

This case provides the Court with an opportunity to finally resolve the polemics precipitated by its plurality

opinion in *Arnett v. Kennedy*, 416 U.S. 134 (1974) over the degree of procedural due process necessary to protect the federally- or state-created property interests of public employees. The interest of amici in the resolution of this controversy is two-fold. In its published decision below, the United States Court of Appeals for the Sixth Circuit held that despite compliance with the statutory provisions of Section 124.34 of the Ohio Revised Code, the Cleveland and Parma, Ohio, Boards of Education failed to adhere to adequate procedural due process safeguards by not affording their employees an opportunity to present evidence in their behalf prior to the employees' discharge for cause. Section 124.34 delineates a comprehensive mechanism through which a public employee in Ohio may appeal any adverse administrative action resulting in a reduction in pay or position, suspension or discharge. The statute specifically provides that a classified civil service employee discharged for cause be given notice of his discharge and the reasons for such action, and an opportunity to be heard in a de novo hearing following termination of employment. By implicitly declaring the procedural safeguards enunciated in Section 124.34 to be constitutionally deficient, the Court of Appeals not only seeks to interfere with Ohio's civil service employment process, it also attempts to impose upon the State the burden of providing a pre-termination hearing, which hearing is beyond the procedural limits on the substantive interest conveyed by the State to its employees. Since the procedural mechanism adopted by Ohio is not unique,[1] tacit recognition by the Court

[1] A majority of states have promulgated statutes somewhat similar to Section 124.34 in that they provide for an evidentiary hearing following the effective date of termination from employment. *See* Ala. Code Section 36-26-27 (1983 Supp.); Alaska Stat. Section 39.25.170 (1983); Ariz. Rev. Stat. Ann. Section 41-785 (1975-83 Supp.); Cal. Gov't Code Section 19574 (West 1980 & 1983-84 Supp.); Conn. Gen. Stat. Sections 5-202, 5-240 (1983); Del.

of the appellate court's interpretation of constitutional due process would have a far-reaching impact not only on the administration of Ohio's classified civil service employment scheme, but also that of other states that have chosen to administer their civil service system in a similar manner. In essence, the Sixth Circuit endeavors to improperly circumvent the states' avowed interest in effectively administering their public employment system by overstepping the boundaries of procedural due process as dictated by the Fourteenth Amendment and as delineated by this Court. *See Arnett v. Kennedy, supra; Mathews v. Eldridge*, 424 U.S. 319 (1976). By virtue of the lack of a constitutional basis upon which to justify the requirements engendered by the opinion of the Court of Appeals, the amici have a substantial interest in the disposition of the question presented herein for review.

Footnote 1 contd.

Code Ann. tit. 29, Section 5949 (1983); D.C. Code Ann. Sections 1-606.3, 1-606.4 (1981); Fla. Stat. Ann. Sections 110.227, 110.309 (West 1982); Official Code Ga. Ann. Section 45-20-8 (1984); Hawaii Rev. Stat. Sections 76-46, 76-47 (1976 & 1983 Supp.); Idaho Code Section 67-5316 (1980); Ind. Code Ann. Sections 4-15-2-34, 4-15-2-35 (Burns 1981 & 1984 Supp.); Iowa Code Ann. Section 19A.14 (West 1978); Kan. Stat. Ann. Section 75-2949 (1983 Supp.); Ky. Rev. Stat. Section 18A.095 (1982 Supp.); La. Const. art. 10, Sections 8, 12 (West 1984 Supp.); Me. Rev. Stat. Ann. tit. 5, Section 678 (1979); Mich. Const. art. 11, Section 5 (1963) (*see also* Michigan Civil Service Commission Rules); Minn. Stat. Section 43A.33 (1982); Miss. Code Ann. Sections 21-31-23, 21-31-71 (1972); Mo. Rev. Stat. Sections 36.380, 36.390 (1978 & 1982 Supp.); Rules and Regulations of the Nebraska State Personnel System, tit. 273, ch. 16, rule 003.07 (1984); Nev. Rev. Stat. Sections 284.385, 284.390 (1982); N.H. Rev. Stat. Ann. Section 98.15 (1977), N.J. Stat. Ann. Sections 11:15-3, 11:15-4 (West 1976); N.C. Gen. Stat. Section 126-35 (1981); Okla. Stat. Ann. tit. 74, Section 841.13 (West 1983-84 Supp.); Or. Rev. Stat. Sections 240.555, 240.560 (1977); Pa. Stat. Ann. tit. 71, Section 741.807 (Purdon 1962); R.I. Gen. Laws Sections 36-4-38, 36-4-40 – 36-4-42 (1970); S.D. Codified Laws Ann. Section 3-6A-38 (1980 & 1983 Supp.); Tenn. Code Ann. Sections 8-30-326, 8-30-327 (1980 & 1983 Supp.); Vt. Stat. Ann. tit. 3, Section 926 (1983 Supp.); Va. Code Section 2.1-114.5:1 (1983 Supp.); Wash. Rev. Code Ann. Section 41.06.170 (1984-85 Supp.); W. Va. Code Section 29-6-15 (1980); Wis. Stat. Ann.

SUMMARY OF ARGUMENT

The concept of constitutional due process embodies certain procedural requisites necessary to protect independently created property interests. These procedural safeguards have always been interpreted to include the minimum requirements of notice and an opportunity to be heard. However, due to the flexible nature of due process, the necessity of providing meaningful process has not always been viewed as a mandate for the provision of a hearing prior to deprivation of a property right. Where a state provides for expeditious post-deprivation review as a means by which to correct any administrative error, the need for a pre-deprivation hearing is pretermitted, especially where the magnitude of the governmental interest as balanced against the private interest affected counsels in favor of prompt governmental action. The Due Process Clause does not act to extend the expectations in an interest beyond that which is already provided. If the State chooses to delineate the scope of entitlement to a substantive right through constitutionally acceptable procedures, the concept of due process elicits nothing more than compliance with the statutory procedural mechanism on which the property interest is based.

Footnote 1 contd.

Sections 230.34, 230.44 (West 1983-84 Supp.); Wyo. Stat. Section 9-2-1019 (1977).

Those states that do provide for a full pre-termination hearing by statute number in the minority. Various of these states establish the provision for a hearing prior to discharge through statutorily defined grievance procedures. *See* Col. Rev. Stat. Section 24-50-125 (1982 & 1983 Supp.); Ill. Ann. Stat. ch. 127, Section 63b111 (Smith-Hurd 1983-84 Supp.); Md. Ann. Code art. 64A, Section 33 (1983); Mass. Ann. Laws ch. 31, Section 41 (Michie/Law Co-op 1983); N.Y. Civ. Serv. Law Section 75 (1983 & 1983-84 Supp.); S.C. Code, Ann. Section 8-17-340 (Law Co-op 1983 Supp.); Utah Code Ann. Section 67-19-18 (1983 Supp.).

ARGUMENT

A STATE'S STATUTORY PROVISION AFFORDING CLASSIFIED CIVIL SERVICE EMPLOYEES DISCHARGED FOR CAUSE WITH NOTICE OF THEIR DISCHARGE AND THE REASONS THEREFOR AND AN OPPORTUNITY TO BE HEARD IN A DE NOVO POST-TERMINATION HEARING CONVEYS THAT MEASURE OF DUE PROCESS REQUIRED BY THE FOURTEENTH AMENDMENT AS NECESSARY TO SAFEGUARD PROPERTY INTERESTS IN CONTINUED EMPLOYMENT.

A. Where The Scope Of A Substantive Right Is Defined By Certain Statutory Procedural Requirements, Adherence To Those Procedures Satisfies The Measure Of Process Due To Protect The Interest Conveyed.

As a rule the states possess broad powers in controlling the selection and discharge of their classified employees. *Slochower v. Board of Education of the City of New York,* 350 U.S. 551 (1953). However, where a state creates a property interest through the grant of a specific benefit to which its employees have a legitimate claim of entitlement, the Due Process Clause of the Fourteenth Amendment extends its procedural safeguards to prevent the state from arbitrarily abrogating the interest it has conveyed. *Board of Regents v. Roth,* 408 U.S. 564, 569, 576-577 (1972); *Goss v. Lopez,* 419 U.S. 565 (1975); *Ingraham v. Wright,* 430 U.S. 651, 672 (1977). Since property interests originate from the

creation of specific substantive rights and not from the Constitution, the quantum of process due to protect those interests is very much dependent upon the procedural restrictions, if any, intertwined with the grant of the substantive right. *Arnett v. Kennedy,* 416 U.S. 134 (1974). Naturally, the concept of due process revolves around the presence of minimum safeguards, such as notice and an opportunity to be heard, that are inherent in preserving constitutional prerogatives. *See Wolff v. McDonnell,* 418 U.S. 539, 557-559 (1974); *Armstrong v. Manzo,* 380 U.S. 545 (1965). However, as this Court has continually recognized, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961); *Perry v. Sindermann,* 408 U.S. 593, 601 (1972). For this reason, where a property right as defined by state statute is not absolute, but is limited by the availability of particularized procedural safeguards, adherence to those safeguards satisfies the spirit of due process. *Arnett v. Kennedy,* 416 U.S. at 151-154.

By virtue of Section 124.34 of the Ohio Revised Code, a person employed in the classified civil service of the State holds a property interest in continued employment absent cause for discharge.[2] *Jackson v. Kurtz,*

[2]Section 124.34 of the Ohio Revised Code provides in pertinent part:

> The tenure of every officer or employee in the classified service of the state and the counties . . . holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in Section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections of the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office. A

65 Ohio App. 2d 152, 157-158, 418 N.E. 2d 1064 (1979). The interest conveyed, however, is a limited one subject to certain restrictions, both in substance and procedure. Violation of any of the substantive provisions constitutes cause for removal. Once "cause" has been established, protection of the underlying property interest is secured through the provision of specific

Footnote 2 cont'd.

> finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute a violation of Chapter 102. of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal.
>
> In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.
>
> Within ten days following the filing of such order the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.
>
> In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code. . . .

procedural requirements which allow for the discharged employee to present his case against removal. After being fully notified in writing as to his discharge and the reasons therefor, either prior to or concomitant with actual termination, the employee is given ten (10) days in which to appeal the adverse ruling against him. An independent trial board is appointed to hear the appeal within thirty (30) days of its filing, and further appeals may be had through the State's judicial system. Should a finding be made of dismissal without just cause, the affected employee is entitled to reinstatement and full back pay.

In *Arnett v. Kennedy, supra*, a plurality of this Court, in considering a federal statute somewhat similar in scope to Section 124.34, noted that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right," the substantive right cannot be viewed independently from the procedural mechanism which enforces it. *Id.* at 152-154. In other words, though the employee has a right not to be removed from employment other than for cause, the entitlement to that right is expressly limited by the procedures through which cause for removal is delineated. *Id.* at 151-152. By "limit[ing] an employee's right to a full evidentiary hearing after discharge at the same time that it first vests the property right to continuing employment," *Loudermill v. Cleveland Board of Education*, 721 F. 2d 550, 560 (6th Cir. 1983), the interest created by Section 124.34 is not solely "a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedure which [the State] has designated for the determination of cause." *Arnett*, 416 U.S. at 152.

It is axiomatic that "[w]hen protected interests are implicated, some kind of hearing is paramount" in order to afford the person being deprived the opportunity to be heard. *Roth*, 408 U.S. at 569-570; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). However, "[t]he types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." *Arnett*, 416 U.S. at 155. *Arnett* dictates that if the means by which the property right is conveyed also prescribes the procedural method by which that right is to be protected, then the Due Process Clause does not act to extend the expectations in the interest beyond what is already provided. 416 U.S. 151-154, 163. On this basis, a state's administrative appeal procedures following discharge for cause, such as that provided for in Section 124.34, would be in sufficient compliance with the dictates of the Fourteenth Amendment. Once the state determines to base the grant of a substantive right on the procedural rudiments of notice and an opportunity to be heard in a post-termination hearing, the Constitution does not act to impose upon the state the requirement of additional procedural safeguards not statutorily present, nor constitutionally mandated. *Arnett, supra*. Since the situation presented herein is not one in which no measure of due process has been afforded, allowance for the judicial imposition of supplementary procedural process would fly in the face of the State's settled precedent disavowing the need for a pre-termination hearing.[3] More importantly, the require-

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[3]In resolving a challenge to the constitutionality of Section 124.34 identical to the one raised herein, the Supreme Court of Ohio, relying on this Court's decision in *Arnett v. Kennedy, supra*, determined in the case of *Parfitt v. Columbus Correctional Facility*, 62 Ohio St. 2d 434, 406 N.E. 2d 528, *cert. denied*, 449 U.S. 1061 (1980), that a pre-termination hearing is

ment of additional procedures would unconstitutionally broaden the scope of procedural due process as defined by this Court. As long as the state defines a substantive right to include the procedures necessary to deprive a public employee of his job, the employee's subsequent removal for cause does not deprive him of a property interest to which he was entitled. *See generally* Note, *Justice Rehnquist's Theory of Property*, 93 Yale L.J. 541 (1984). On this basis, the Constitution requires nothing outside of compliance with the relevant statutory procedures in order to satisfy the demands of procedural due process.

B. The Due Process Clause Has Never Been Interpreted To Require Provision Of A Pre-Termination Hearing To A Classified Civil Service Employee Discharged For Cause.

Mere postponement of the judicial inquiry into the justifications for removal of property rights is not deemed a denial of due process so long as the opportunity given for ultimate judicial determination is adequate. *Parratt v. Taylor*, 451 U.S. 527, 540 (1981); *see Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 611 (1974), *citing Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931); *see also Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1949). Due process requires only that some kind of

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Footnote 3 cont'd.

neither a component of the interest created by the State, nor necessary to satisfy the requirements of procedural due process. In light of the fact that *Arnett* approved a procedure "essentially the equivalent of the one provided for classified employees in R.C. Chapter 124," *id.* at 438, the procedural limitations intertwined with the grant of the substantive right in Section 124.34 were deemed constitutionally sufficient. Though the Sixth Circuit made note of the State's statutory interpretation, 721 F. 2d at 560, it chose to ignore the State's delineation of its property interest in favor of a differing constitutional interpretation of the Due Process Clause.

hearing be provided before the state finally deprives a person of his property interest; however, the necessity of providing such a hearing "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo, supra*, has never been interpreted by this Court to translate into an absolute requirement for a hearing prior to deprivation of a property right. *Parratt v. Taylor*, 451 U.S. at 540-541. When "the necessity of quick action by the state or the impracticality of providing any meaningful pre-deprivation process [is] . . . coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking," procedural due process is satisfied and its substantive guarantees left intact. *Id.* at 539 (footnote omitted).

Due to the fact that procedural due process has always been considered a creature of circumstance, analyzed and applied on a case-by-case basis, *Cafeteria Workers v. McElroy*, 367 U.S. at 895; *Arnett v. Kennedy*, 416 U.S. at 167-168 (Powell, J., concurring), consideration of what procedural safeguards are required under any given set of circumstances is predicated upon a balancing of the following factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest absent a pre-termination hearing and the possible value of additional or substitute procedural safeguards; and (3) the governmental interest in efficiently effecting the deprivation. *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Wolff v. McDonnell*, 418 U.S. at 560.

In the case of a discharged public employee, as in the case of a welfare or social security disability recipient, the protected interest of the employee is in the uninter-

rupted flow of income pending the final administrative decision regarding his case. It is therefore evident that the degree of potential deprivation that may be created by governmental action forms the crux of assessing the adequacy of the procedural process afforded. On only one occasion has the Court held that due process mandates the need for an evidentiary hearing prior to a temporary deprivation. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court found that the risk of an erroneous deprivation upon termination of an individual's public welfare payments far outweighed the government interest involved and the resultant burden to be borne by the state in providing a prior hearing. It was noted that the crucial factor necessitating a prior hearing, "not present in the case of the . . . discharged government employee. . ., or virtually anyone else whose government entitlements are ended," was the termination of the very means by which an *eligible* recipient was to live. *Id.* at 263-264. Conversely, in *Mathews v. Eldridge, supra*, it was ascertained that though a recipient of social security disability benefits had an interest in maintaining those benefits pending a final adjudication of his eligibility, the risk of an erroneous deprivation absent a prior evidentiary hearing was minimal due to the medical documentation required to substantiate cause for termination. Moreover, the degree of financial dependence on continued income, deemed of major importance in *Goldberg*, was simply not a factor in assessing the degree of the deprivation in *Mathews* due to the inapplicability of financial need in determining social security eligibility. In light of the opportunity for full retroactive relief following a favorable judicial decision, the Court deemed the deprivation in *Mathews* not of the level necessary to impose upon the government the additional procedural requirement of a pre-termination hearing.

The marked contrast between the potential loss suffered by a welfare recipient whose benefits are temporarily revoked and that suffered by the discharged public employee is highly suggestive of the level at which the risk affecting the private interest will mandate the need for a hearing prior to adverse governmental action. In *Goldberg*, the Court found that a welfare recipient was "on the very margin of subsistence;" therefore, the need for a prior hearing was of constitutional necessity. Though quick to distinguish the circumstances present in *Goldberg*, the Court conceded in *Mathews* that the hardship imposed upon an erroneously terminated disability recipient could be significant. However, in light of a balancing of the varying interests involved, the potential hardship was deemed less serious than that weighted in *Goldberg*, even in light of the possibility of delays of up to one year between termination and reinstatement of disability benefits.[4]

In light of the factors considered significant in labeling a potential deprivation of the level necessary to mandate pre-termination process, the case of the discharged government employee presents a clear-cut case wherein

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[4]The Court recently issued a decision revolving around the procedural mechanism promulgated by Congress to adjudicate eligibility for social security disability payments under Title II of the Social Security Act. Though the issue before the Court did not directly concern the propriety of the procedural safeguards provided, the Court indirectly acknowledged the adequacy of the statutory post-termination review procedures by holding that it is outside the purview of the judiciary to disturb the adjudicatory process of Title II claims as set forth by Congress. The Court acknowledged that such is the case despite the fact that the delay between termination and reinstatement may take anywhere from 90 to 180 days or possibly longer. *Heckler v. Day*, 52 U.S.L.W. 4636 (U.S. May 22, 1984) (No. 82-1371).

the availability of post-termination safeguards pretermits the need for a pre-termination hearing. It is evident that in the cases considered by this Court that have followed *Goldberg*, the Court's rationale respecting the scope of procedural due process has remained unchanged:

> When prompt post-deprivation review is available for correction of administrative error, we have generally required no more than that the pre-deprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.

Mackey v. Montrym, 443 U.S. 1, 13 (1979) (suspension of a driver's license without a pre-suspension hearing deemed procedurally sufficient under Due Process Clause). Indeed, in cases such as *Montrym*, the Court has maintained that a pre-deprivation hearing has not been necessary even though the petitioner had no opportunity for being made whole at a later date if he were to prevail. *See e.g., Dixon v. Love*, 431 U.S. 105, 113 (1977); *Barry v. Barchi*, 443 U.S. 55 (1979).[5] Where

[5]The various federal circuit courts remain divided in interpreting the constitutional need for a pre-termination hearing. The opinion of the Sixth Circuit is in direct conflict with four circuits that have specifically upheld the adequacy of post-termination procedures absent the provision of a pre-termination proceeding. In *Bullock v. Mumford*, 509 F. 2d 384 (D.C. Cir. (1974), the circuit court declared that in light of the precepts announced in *Arnett*, the absence of a hearing in advance of separation is not, in and of itself, constitutionally defective. The Court of Appeals for the Seventh Circuit in *Clanton v. City of Chicago*, 634 F. 2d 1069 (7th Cir. 1980), carried this caveat one step further by applying the balancing test enunciated in *Mathews* to find that the need for a pre-suspension hearing was obviated by the presence of adequate post-termination procedures, including a provision

some valid governmental interest is at stake, such as the ability to take prompt action against an employee who has clearly violated statutory regulations governing his position of employment, the need for a prior hearing becomes unnecessary. *Fuentes v. Shevin*, 407 U.S. 67, 82, 90-91 (1972,; *see also Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971). By assuring the opportunity for a post-termination hearing, reinstatement and back pay, and thus minimizing the possibility of a wrongful termination, a state, such as Ohio, can allow for a balance to be had between its own interest in the expeditious removal of an unsatisfactory employee and the interest of

Footnote 5 cont'd.

for back pay. In *Webb v. Dillon*, 593 F. 2d 656 (5th Cir. 1979), the Fifth Circuit upheld the constitutional propriety of Georgia's termination provisions for court employees. Though the Georgia statute did not provide for any pre-termination opportunity to respond, it did require notice of discharge, a ten day time limit for appealing to a civil service board, and a post-termination hearing, very much like the procedures mandated in Section 124.34 of the Ohio Revised Code. Finally, in *Johnston v. Herschler*, 660 F.2d 617 (10th Cir. 1982), the Tenth Circuit recognized the sufficiency of post-termination process in light of *Arnett v. Kennedy*, *supra*.

A number of other circuit courts, however, have reached opposite conclusions. *See Vanelli v. Reynolds School District No. 7*, 667 F. 2d 773 (9th Cir. 1982); *Abraham v. Pekarski*, 728 F. 2d 167 (3d. Cir. 1984); *Collins v. Robinson*, 562 F. Supp. 1464 (E.D. Ark. 1983), *aff'd*, No. 83-2400, slip opinion (8th Cir. June 4, 1984). At least two circuits show conflicting avenues of thought within their individual jurisdictions as to the necessity and degree of pre-termination process required. *Compare Glenn v. Newman*, 614 F. 2d 467 (5th Cir. 1980) *and Jackson v. Soiechomb*, 635 F. 2d 462 (5th Cir. 1981) *with Thurston v. Dekle*, 531 F. 2d 1264 (5th Cir. 1976), *vacated and remanded on other grounds*, 438 U.S. 901 (1978) *and Gurney v. Sonora Independent School District*, 603 F. 2d 522 (5th Cir. 1979); *compare also Miller v. City of Mission, Kansas*, 705 F. 2d 368 (10th Cir. 1983) *with Johnston v. Herschler*, *supra*.

the affected employee in continued employment. Additionally, the state is freed from the administrative burdens inherent in providing for elaborate pre-termination proceedings for an employee for whom cause for removal has been documented, and the employee has the intermediate option of seeking temporary employment to assuage the potential financial hardship, if any, he may suffer. *See Goldberg v. Kelly*, 397 U.S. at 263-264, *Mathews v. Eldridge*, 424 U.S. at 341. Due to the continuing flexibility in application of the dictates of the Fourteenth Amendment, it is manifest that the ability to convey due process does not hinge upon the mandatory presence of an opportunity to be heard prior to governmental action. Rather, it is the balance invoked by the nature of the affected interests which evinces the adequacy of the process provided, and where adequate and prompt post-termination review constitutes the statutory norm, the constitutional requirement of procedural due process is fulfilled.

CONCLUSION

For the foregoing reasons, the decision of the circuit court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief of Amici Curiae in Support of Petitioners have been served by U.S. Mail, postage prepaid, on this _____ day of July, 1984, on the following counsel of record:

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AMICUS CURIAE

BRIEF

Nos. 83-1362, 83-1363

Office Supreme Court, U.S.
FILED
JUL 19 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

Cleveland Board of Education,
Petitioner,

v.

James Loudermill,
Respondent.

Parma Board of Education,
Petitioner,

v.

Richard Donnelly,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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Nos. 83-1362, 83-1363

IN THE
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Cleveland Board of Education,
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Parma Board of Education,
Petitioner,

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Respondent.

MOTION OF THE NATIONAL SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National School Boards Association moves this Court for leave to participate as amicus curiae herein, for the purpose of filing the attached brief.

Counsel for all parties have consented to the filing.

Respectfully submitted,

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Nos. 83-1362, 83-1363

IN THE

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AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS

Amicus curiae National School Boards Association (NSBA), is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school

boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education and to encourage the most efficient and effective organization and administration of the public schools.

Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

NSBA submits this brief in the belief that the requirement of a pre-termination hearing in cases where employees are terminated "for cause" and provided a prompt post-termination hearing, goes beyond the historical rationale behind the due process clause and seriously erodes

the ability of school boards to promptly and efficiently administer the public schools.

ISSUES PRESENTED FOR REVIEW

1. Where the scope of a substantive right is defined by certain statutory procedural requirements, adherence to those procedures satisfies the measure of process due to protect the interest conveyed.

2. Where there is no dispute as to the existence of "cause" for termination, a pre-termination hearing is not required for the purpose only of determining mitigating circumstances.

ARGUMENT

NSBA agrees fully with the arguments made herein by Petitioners and by amicus,

State of Ohio. Amicus incorporates by reference the arguments set forth in amicus brief filed herein by the State of Ohio.

In the cases at bar, both of the employees knew at the time of their employment that their employment was conditioned. Most public employees, particularly those in a "professional" capacity, such as teachers and administrators, are subject to conditions which are made known at the time of employment. Although its not unreasonable to require the employer to give tenured employees notice of the reasons for termination, it is unreasonably burdensome to require anything more, particularly where the discharge is for failure to meet the objective standards of employment.

Respectfully submitted,

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PETITIONER'S

BRIEF

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Is a pre-termination hearing required when a civil service employee is found to have lied on his application form and state statutes provide an adequate and constitutionally acceptable post-termination process as required by the Fourteenth Amendment to the United States Constitution?

PARTIES

The Plaintiff-Appellant in the proceeding in the Court of Appeals was James Loudermill. The Defendants-Appellees in the Court of Appeals were the Cleveland Board of Education (John Gallagher, President), the City of Cleveland (George Voinovich, Mayor), the Cleveland Civil Service Commission (Thomas R. Skulina, President), and William J. Brown (Attorney General of the State of Ohio). The Attorney General was named in the complaint, but none of the allegations pertained to the State of Ohio, no relief was sought against the State of Ohio, and the State of Ohio did not participate in the proceedings before the Court of Appeals.

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ON WRIT OF CERTIORARI TO THE
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BRIEF OF PETITIONER

The Cleveland Board of Education petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment entered by that court against it.

OPINIONS BELOW

On November 6, 1981, U. S. District Judge John M. Manos issued an opinion and an order dismissing James D. Loudermill's application to proceed *in forma pauperis* (Pet. App., A34-A49).

On February 22, 1982, Judge Manos issued another opinion and order denying Loudermill's motion to alter or amend his previous judgment (Pet. App., A50-A62).

On November 17, 1983, the United States Court of Appeals for the Sixth Circuit issued a decision* affirming in part and vacating and remanding in part the opinion and order of the United States District Court (Pet. App., A1-A33).

JURISDICTIONAL STATEMENT

This petition seeks reversal of a decision of the United States Court of Appeals for the Sixth Circuit entered on November 17, 1983.

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution states, in pertinent part, as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

2. Ohio Revised Code §124.34 states, in pertinent part, as follows:

---

*This decision was recommended for full-text publication pursuant to Sixth Circuit Rule 24. As of the date of this Petition the decision has not been published.

> **Tenure of office; reduction, suspension, and removal; appeal**
>
> The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services, or the commission, or any other acts of misfeasance, malfeasance, or nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute a violation of Chapter 102 of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal.
>
> In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.

Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.

STATEMENT OF THE CASE

Respondent filed a complaint in the United States District Court for the Northern District of Ohio seeking to proceed *in forma pauperis* (J.A. 6-12). The District Court, *sua sponte*, issued an order denying leave to proceed *in forma pauperis* and dismissing the complaint with prejudice for failure to state a claim upon which relief could be granted (Pet. App. A34). The District Court determined that Respondent's claim that Ohio Revised Code §124.34 deprived him of procedural due process was without merit, and further determined that the delay in Respondent's post-termination statutory appeals did not constitute a violation of his due process rights (Pet. App. A36).

Respondent appealed to the United States Court of Appeals for the Sixth Circuit (Pet. App. A1). Said Court

affirmed the District Court's dismissal of Respondent's Complaint which alleged that the delay in his post-termination hearings violated his due process rights, but vacated and remanded for further consideration the District Court's judgment that dismissed the pre-termination procedural due process claims (Pet. App. A30). The Court of Appeals indicated that Respondent could seek to prove that he sustained damages stemming from the State's failure to provide any pre-termination due process (Pet. App. A30).

This petition asks this Court to reverse the Court of Appeals' judgment reversing and remanding the District Court's order dismissing Respondent's claim of damages stemming from the fact that no pre-termination hearing was held in the instant case.

FACTS

The facts in the instant case are uncontroverted. Respondent was employed as a security guard in 1979 by a private firm, which was under contract to provide security guards for the Petitioner Cleveland City School District. Some time in 1979, said firm declared bankruptcy and Respondent applied for a similar position with the Cleveland City School District itself.

On or about September 25, 1979, Respondent's application for employment was accepted by the Cleveland Board of Education, and he began to work as a security guard immediately thereafter. On his application, Respondent was asked the following question:

"Have you ever been convicted of a crime (felony)?"

Respondent answered:

"No."

At the end of the application there is the following paragraph:

> "I certify that all the statements made by me in this application are true, complete and correct to the best of my knowledge and that I am aware that any false statements will be sufficient cause for dismissal from or refusal of an appointment for any position with the Cleveland Board of Education."

On September 1, 1980, Respondent was transferred from his position as a security guard to the newly created Department of Safety and Security. Pursuant to this transfer, a routine examination of Respondent's employment records was conducted and revealed that he had been convicted of a felony (burglary of an inhabited dwelling and grand larceny) in 1968.

Upon confirming this fact through a check of the records of the Common Pleas Court of Cuyahoga County, Ohio, the Cleveland School Board, on November 3, 1980, sent Mr. Loudermill a letter terminating him from his employment. The Board of Education, at its meeting of November 13, 1980, adopted Resolution No. 551-80 affirming Respondent's termination.

On November 12, 1980, Respondent filed a Notice of Appeal with the Cleveland Civil Service Commission. On January 29, 1981, a hearing was held before a referee of that Commission. Thereafter, on or about April 1, 1981, the referee filed his findings and recommendation. On July 20, 1981, a hearing on Respondent's claim was conducted before the full Cleveland Civil Service Commission which orally announced that it would affirm Respondent's dismissal from employment. On August 10, 1981, the Commission approved Proposed Findings of Fact and Conclu-

sions of Law upholding the termination of Respondent. Respondent failed to file or perfect any appeal to the Cuyahoga County Court of Common Pleas, as provided by Ohio Revised Code §124.34, and his termination is therefore valid and final.

SUMMARY OF ARGUMENT

It is the position of Petitioner Cleveland Board of Education that the post-termination hearing provisions as provided under Ohio Revised Code §124.34 are sufficient and adequate to fulfill the constitutional due process requirements. Petitioner Cleveland Board of Education asserts that pursuant to Supreme Court decisions in *Matheus v. Eldridge* and *Arnett v. Kennedy* no pre-termination hearing is required and a post-termination hearing is sufficient to protect a person's due process rights.

Alternatively, it is the position of the Petitioner Cleveland Board of Education that Respondent Loudermill's claim of a due process violation is meritless because he has no property right on which to base his claim. Under *Board of Regents v. Roth* and *Bishop v. Wood*, it is the Petitioner Cleveland Board of Education's position that in order for Respondent Loudermill to make a claim of a due process violation he must first establish that he has a property right. Such a property right would arise not from the Constitution, but from state law. Under the facts of the instant case, Respondent Loudermill had no property right as he misrepresented his criminal past on his application. Therefore, his right to a job is void and no property right existed at any time for the due process clause to protect.

ARGUMENT

I. THE DUE PROCESS WHICH LOUDERMILL RECEIVED WAS SUFFICIENT UNDER THE FOURTEENTH AMENDMENT.

The post-termination hearing that Loudermill was granted under Ohio Rev. Code §124.34 was sufficient to fulfill constitutional due process requirements.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court delineated the three factors in determining the adequacy of due process: 1. the private interest that will be affected by the official action; 2. the risk of an erroneous deprivation of such an interest and the value, if any, of additional safeguards; and 3. the government's interest, including the function involved and the burden of additional procedures.

In *Mathews*, using the above tests, this Court held that an evidentiary hearing was not required prior to the termination of Social Security benefits. The facts of the instant case reflect an even less compelling reason for requiring a pre-termination hearing than those presented in *Mathews*.

The cases relied upon by the Sixth Circuit requiring a pre-termination hearing dealt with property *or* liberty deprivations that were permanent, even if of short duration, in nature. The case of *Bell v. Burson*, 402 U.S. 535 (1971), centered on the suspension of a driver's license. *Goss v. Lopez*, 419 U.S. 565 (1975) involved a student's removal from school. *Vitek v. Jones*, 445 U.S. 480 (1980) concerned a prisoner's transfer to a mental institution.

While the degree of harm varied in these cases, they were analogous in the permanence of the deprivation.

Regardless of how soon a hearing would have been held after the deprivation in the above cases the individuals would have forever lost the time spent without a license, education in the classroom, and the time incarcerated in a mental facility.

Respondent Loudermill, in contrast, would temporarily have been without his wages and benefits. These could have been retroactively computed had a post-termination hearing later determined that his termination was invalid. The harm caused Respondent by his termination would not be of the permanent nature of that in *Bell*, *Goss* and *Vitek*.

In *Arnett v. Kennedy*, 416 U.S. 134 (1974), a case in which this Court upheld the post-termination hearing of a governmental employee's claims, Justice Rehnquist stated that, "the type of . . . 'property' protected by the Due Process clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." *Id.* at 155. Restated, when the interest involved may still be protected by retroactive determination, as in Loudermill's case, a post-termination hearing is sufficient to protect a person's due process rights. The Sixth Circuit thus incorrectly applied the rulings of *Bell*, *Goss*, and *Vitek* to this case.

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), a case in which a welfare recipient's benefits were terminated without a hearing, this Court ruled that a pre-termination hearing was necessary because a welfare recipient would be destitute without welfare payments. The vital necessity that welfare benefits played in the recipient's life was the "[c]rucial factor in this context—a factor not present in the case of . . . a discharged governmental employee, or virtually anyone else whose governmental entitlements

are ended." *Id.* at 264 (emphasis added). Obviously, Loudermill is the very "discharged governmental employee" which *Goldberg* distinguished from those needing a pre-termination hearing.

Petitioner asserts that under the first factor of the *Matheus* test the private interest (employment) of Respondent Loudermill can be adequately protected pursuant to Ohio Revised Code §124.34 and the procedure outlined therein.

Under the second factor in *Matheus* the risk of an erroneous decision in the instant case is negligible. Respondent's termination was based upon Court records and his signed application. While it is conceded that a pre-termination hearing would prevent the temporary cut-off of employment compensation to those who were terminated in error, it would safeguard little more than such compensation. If the termination was in error, the employee would simply be reinstated and his record would be expunged of the termination, exactly as would happen under the present procedure of the Ohio Revised Code §124.34. Additional safeguards, involving time, money, and risk of harm or loss of property would not, under the facts of the instant case, result in a more accurate or more informed decision.

Under the third part of the *Matheus* test, the government's interests require that a Board of Education be allowed to immediately remove those individuals who are a danger, however potential, to its pupils, teachers, and property.

It is uncontroverted that in this instance the Respondent is an ex-felon. To allow him to continue in the position of a security guard, especially after he compounded the Board's concerns by misrepresenting himself

on his job application, would be an act clearly contrary to the public good and might border on misfeasance of office for those officials responsible for running the school system. The public interests would best be served by removing such a person from a security guard position first, and then allowing him an opportunity to answer the charges against him. In other words, under the guidelines established in *Matheus*, the Petitioner's need to remove Loudermill, a documented ex-felon who made written misrepresentation on his application, from a position in the school's Department of Safety and Security clearly outweighs the interests of Respondent having a hearing before, rather than after, his termination.

The determination under this *Matheus* analysis that Loudermill was adequately protected by a post-termination hearing is consistent with prior Court statements concerning Civil Service employees. In *Bowning v. Indiana State Employees Association*, 423 U.S. 6 fn. 7 (1975) (per curiam), this Court ruled perfunctorily that a pre-termination hearing for an employee was required only when state statute called for such a hearing. Bowning, like Loudermill, was a Civil Service employee who was terminated without a pre-termination hearing. In remanding the case back to the State Court, this Court made no attempt to impose a pre-termination hearing requirement on the Indiana Civil Service Commission, but stated that state law should control. Under Ohio law no pre-termination hearing is required. Thus, not only does *Matheus* by analysis indicate a post-termination hearing is Constitutional, but decisions by this Court support that conclusion.

The most recent decision in this area recognizes the constitutionality of a law similar to Ohio's post-termination hearing in Civil Service terminations. In the case of

Davis v. Scherer, ___ U.S. ___, 52 U.S.L.W. 4926 (June 28, 1984), the Court stated that "the District Court correctly held that appellee had demonstrated no violation of his clearly established constitutional rights (when) Florida law provided for a full evidentiary hearing after termination." *Id.* at 52 U.S.L.W. 4936. Ohio Civil Service laws also provide for a full evidentiary hearing after termination (Ohio Revised Code §124.34) so, as in *Davis*, appellant "had violated no well established due process rights in discharging a permanent state employee without a pre-termination or a prompt post-termination hearing." *Id.* at 52 U.S.L.W. 4937, citing *Weishaul v. Donigan*, 651 F.2d 334 (5th Cir. 1981).

A similar balancing approach as outlined in *Mathews* has been previously applied by this Court in matters of great public interest. In the case of *Phillips v. Commissioner*, 283 U.S. 589 (1931), the Court upheld the practice of the I.R.S. which required payment of one's taxes before an appeal would be heard. This Court stated that "property rights must yield provisionally to governmental need." *Id.* at 595.

The governmental need to provide a safe and secure school system for its children and to remove undesirable and/or untrustworthy security guards must be at least as important as the governmental need to collect taxes, and thus, like the taxpayer, Loudermill's property interests must yield to the governmental need. Moreover, as stated in *Phillips*, later review is sufficient to protect the property rights of the individual, and thus adequately protect his due process rights without negating governmental needs. Thus, to protect the governmental need to insure only qualified, safe employees are hired and retained in the system, a post-termination hearing must be deemed adequate.

Whether the statutory remedy of a post-termination hearing "constitute[s] due process of law must turn on an analysis of the competing interests at stake, viewed against the background of 'history, reason, [and] the past course of decisions.'" *Ingraham v. Wright*, 430 U.S. 651, 675 (1977), *quoting Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, *J.*, concurring).

In the instant case, the interests of Respondent Loudermill were protected by the post-termination hearing provided pursuant to Ohio Revised Code §124.34 while the governmental needs for safety and security were also protected. In addition, the course of decisions and history have pointed to the adequacy of a post-termination hearing in situations, such as this, where the private interest that will be affected is not irretrievable or life sustaining.

Finally, reason dictates that in a case of such a clear threat to the public's interest—in this case pupils' and teachers' well being and the preservation of the district's properties—a board of education must be allowed to remove an individual of suspect character first and ask questions later. Thereafter, due process ensures an affected person the opportunity to respond to the action and to allow a governmental entity the chance to correct any erroneous decision. Loudermill's post-termination hearing was adequate to protect his alleged property right, and thus was constitutional under the Fourteenth Amendment Due Process Clause.

II. RESPONDENT'S CLAIM OF DUE PROCESS VIOLATIONS IS MERITLESS BECAUSE HE HAS NO PROPERTY RIGHT ON WHICH TO BASE HIS CLAIM.

An individual must "have a legitimate claim of entitlement" to the property he wishes to protect under the Fourteenth Amendment. *Board of Regents v. Roth*, 455 U.S. 564 (1972) at 577. Respondent Loudermill's employment, the result of a misrepresentation of his criminal record on his job application, cannot be a legitimate claim of entitlement since, had Loudermill not lied, he would have immediately been excluded from any position related to school security. To now transform Loudermill's application answer into the basis of a legitimate claim would not only undermine the obvious reason for the question's presence on the job application, but would also amount to condoning the use of a falsehood to create legitimacy.

It thus follows that if Respondent's misrepresentation cannot be a basis for a legitimate claim of entitlement to a property right, Loudermill has no property right on which to base his due process claim.

Furthermore, Ohio law precludes any claim of a property right by Loudermill. A property right arises not from the Constitution, but from state law. *Roth* at 577. See also *Bishop v. Wood*, 426 U.S. 341 (1976). The Cleveland Board of Education, pursuant to its authority to regulate the Cleveland City School District under state law, made the truthful answering of a job application a condition precedent to employment. Loudermill knew this, as shown by his signing of the acknowledgment to this rule on his job application. After his termination the Ohio Civil Service Commission, also pursuant to its powers under state law, determined that Loudermill had violated

the Board's oath and misrepresented his felony past on his application, and so was not eligible for employment. Because Loudermill violated the condition precedent that the Board, as a public body, had set for employment, and the Civil Service Commission concurred, Respondent Loudermill had no property right under Ohio law to the Board job. Therefore he has no right to due process arising from his employment. To find a property right in this case would allow individuals to pervert the purpose of the Fourteenth Amendment due process guarantee.

It goes without saying that due process was incorporated in the Constitution to prevent governmental error or abuse in the termination of property rights held by an individual. In this case Respondent presupposes that, but for due process, his application "misunderstanding" would have been resolved in his favor and his termination would not have occurred. In reality, Loudermill is attempting to use a due process claim to camouflage the fact that he once committed a felony, which would make him unemployable as a security officer watching over Cleveland school pupils and property. Had he answered truthfully he never would have been hired to a security position. Thus rather than making use of his due process rights to protect a legitimate property interest from Board error or abuse, Loudermill is attempting to use due process to preserve a position which, either through his own error or abuse of the application process, he illegitimately obtained. To prevent such a misuse of the Fourteenth Amendment, this Court should find that no property right is held by Loudermill on which to base a claim of due process.

CONCLUSION

For the above stated reasons, Petitioner asks this Court to find that the due process afforded Respondent was constitutionally adequate under the Fourteenth Amendment. In the alternative, Petitioner asks this Court to find that Respondent did not have a property right upon which to stake a claim of due process deprivation.

Respectfully submitted,

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JOINT

APPENDIX

Nos. 83-1362, 83-1363 & 83-6392

Supreme Court, U.S.
FILED
JUL 27 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1983

THE CLEVELAND BOARD OF EDUCATION,
Petitioner,

vs.

JAMES LOUDERMILL, *et al.*

PARMA BOARD OF EDUCATION,
Petitioner,

vs.

RICHARD DONNELLY, *et al.*

JAMES LOUDERMILL,
Petitioner,

vs.

THE CLEVELAND BOARD OF EDUCATION, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

Counsel for Parties on Inside Cover

Petitions for Certiorari in Nos. 83-1362 and 83-1363 Filed February 14, 1984; Petition for Certiorari in No. 83-6392 Filed March 7, 1984
Certiorari Granted May 21, 1984

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0767

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RELEVANT DOCKET ENTRIES

I. Loudermill Case:

10/27/81	1	AFFIDAVIT of Pltf., to proceed in forma pauperis filed.
11/ 6/81	2	MEMORANDUM of Opinion, denying pltf's motion to proceed in forma Pauperis; the case is dismissed with prejudice for failure to state a claim upon which relief can be granted; the court hold the delay which occurred in processing Loudermill's appeal in the instant case does not constitute a violation of his procedural due process rights filed. Manos, J.—copies mailed (noted 11/9/81)
11/ 6/81	3	ORDER, pursuant to the Memorandum of Opinion, issued on this date, the Pltf's motion to proceed in forma pauperis is denied & the case is dismissed with prejudice filed Manos, J. copies mailed (noted 11/9/81)
11/16/81	4	MOTION of Pltf., for a new trial or to alter or amend Judgment, with brief in support and exhibits in support filed. copies mailed 11/16/81
1/19/82	5	SUPPLEMENTAL BRIEF of pltfs. in support of their motion for a new trial or to alter or amend judgment filed. Copy mailed 1/19/82

2/22/82	6	MEMORANDUM OPINION & order denying pltfs.' joint motion to alter or amend court's previous decision filed. Manos, J. (2/22/82)
2/22/82	7	ORDER denying pltfs.' joint motion to alter or amend judgment filed. Manos, J. (2/22/82).
3/23/82	8	NOTICE of Appeal filed re: 2/22/82. c/m Hickey, (by Pltf.) and USCA. (notice to deft. indiv.)
3/23/82	9	MOTION of Pltf. to proceed in forma pauperis filed. c/m 3/23/82. with affidavit attached.
3/29/82	10	MEMORANDUM of opinion denying pltf's. motion to leave to proceed in forma pauperis to USCA. Manos, J.
3/29/82	11	ORDER denying pltf. motion for leave to appeal in forma pauperis to USCA. Manos, J.
4/ 6/82		CERTIFIED original pleadings mailed to Clerk, USCA.
4/21/82		ACKNOWLEDGEMENT of Transmission form from USCA case no. 82-3227 filed in USCA 3/29/82, filed.
12/13/83		MANDATE from U.S.C.A. (issued: 12/9/83) before: Merritt, Wellford, & Timbers, C.J., on judgment entry that this case be and the same is hereby affirmed in part; vacated and remanded in part filed. Costs: Pending
12/13/83		OPINION filed.

RELEVANT DOCKET ENTRIES

II. Donnelly Case:

10/27/81	1	COMPLAINT filed.
10/27/81	2	INITIAL ORDER filed. Manos, J. (noted 10/27/81)
10/27/81		SUMMONS issued. 7 copies of complaints Notices re: Magistrates, Initial Orders and summons to U.S.Marshal.
11/ 6/81	3	MEMORANDUM of Opinion dismissing Pltf's complaint for failure to state a claim upon which relief can be granted; this Court hold Donnelly's allegation fails to state a claim of constitutional dimension under 42 U.S.C. §1983 filed. Manos, J. - copies mailed (noted 11/9/81)
11/ 6/ 81	4	ORDER, pursuant to the Memorandum of Opinion issued on this date, the Pltf's complaint is dismissed filed. Manos, J. - copies mailed (noted 11/9/81)
11/16/81	5	MOTION of Pltf., for a new trial or to alter or amend Judgment, with brief in support & exhibits in support filed. copies mailed 11/16/81 (See C81-2132)
11/20/81	6	SUMMONS returned and filed. - Served Ralph Scheel, 11/2/81; served Parma Board of Education 11/2/81; Served Mayor of City of Parma, John Petruska 11/2/81; served Leo Hepner 11/2/81; served Parma Civil Service Commis-

		clerk 11/2/81 served Donald Naron. FEES: $86.03
12/ 8/81	7	SUMMONS returned & filed. - Re: William J. Brown, Atty. General of Ohio Unexecuted - FEES: $3.00
1/19/82	8	SUPPLEMENTAL BRIEF of plffs. in support of their motion for a new trial or to alter or amend judgment filed. Copy mailed 1/19/82
2/ 4/82	9	NOTICE of John T. Meredith of Appearance on behalf of deft. Board of Education of the Parma City School District filed. Copy mailed 2/4/82.
2/22/82	10	MEMORANDUM OPINION & order denying plff.'s joint motion to alter or amend previous decision filed. Manos, J. (See 81-2132)
2/22/82	11	ORDER denying plffs.' joint motion to alter or amend judgment filed. Manos, J. (See 81-2132).
3/23/82	12	NOTICE of Appeal filed re: 2/22/82. C.M. Hickey & Fertel, Meredith and USCA. filed.
4/ 6/82		CERTIFIED original pleadings mailed to Clerk, USCA
4/ 2/82		Letter of City of Parma to list Mr. Boyko and Mr. Bond as Counsel for City of Parma, filed. (n.4/6/82)
4/21/82		ACKNOWLEDGEMENT of Transmission form from USCA case no. 82-2226 filed in USCA 3/29/82, filed.

12/13/83	MANDATE from U.S.C.A. (issued: 12/9/83) before: Merritt, Wellford, & Timbers, C.J. Judgment entry that this case be and the same is hereby affirmed in part; vacated and remanded in part filed. Costs: Pending
12/13/83	OPINION filed.

Case No. C81-2122

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Ohio
Eastern Division

JAMES LOUDERMILL, Individually and on behalf of all others similarly situated,
Plaintiff,

vs.

CLEVELAND BOARD OF EDUCATION JOHN GALLAGHER, PRESIDENT, Individually and on behalf of all others similarly situated,

and

CITY OF CLEVELAND GEORGE V. VOINOVICH, MAYOR, Individually and on behalf of all others similarly situated,

and

CLEVELAND CIVIL SERVICE COMMISSION THOMAS R. SKULINA, PRESIDENT, Individually and on behalf of all others similarly situated,

and

WILLIAM J. BROWN Attorney General, State of Ohio,
Defendants.

COMPLAINT FOR MONETARY INJUNCTIVE AND DECLARATORY RELIEF

(Affidavit of Plaintiff to proceed in forma pauperis filed October 27, 1981)

(1) JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to 28 United States Code Sections 1343 (3) and 4, 2201,

and 2202. This is an action for damages, injunctive and declaratory relief authorized by 42 United States Code Section 1983 to be commenced by the Plaintiff and the class he represents, as a citizen of the United States, to redress the deprivation, by Defendants' actions under color of Ohio Revised Code Section 124.34, of rights served by the Fourteenth Amendment to the Constitution of the United States.

2. Jurisdiction is also conferred on this court by 28 United States Code Section 1331 this being a suit wherein the matter in controversy exceeds the sum of Ten thousand dollars ($10,000.00), exclusive of interest and costs, arising under the Constitution and laws of the United States.

PARTIES

3. The Plaintiff is a resident of the City of Cleveland, County of Cuyahoga and State of Ohio and is a citizen of the United States and was a classified civil service employee pursuant to the laws of the State of Ohio.

4. Defendant Cleveland Civil Service Commission is an organizational division of the Defendant City of Cleveland.

5. Defendant Cleveland Board of Education is an appointing authority pursuant to the civil service laws of the State of Ohio.

6. Defendant William J. Brown is the Attorney General of the State of Ohio and is named as a party defendant in this action solely because the constitutionality of a certain Ohio Statute is being drawn into question. None of the allegations that follow apply to William J. Brown and no relief is sought against him.

CLASS ACTION

7. Plaintiff brings this action pursuant to Rules 23 (a), 23 (b)(4)(B) and 23 (b)(2) of the Federal Rules of Civil Procedure. Plaintiff's class [3] consists of all classified civil service employees in the State of Ohio who have been or who could be suspended or removed from their employment without sufficient due process procedures.

8. Defendant Cleveland Board of Education represents all appointing authorities in the State of Ohio pursuant to the Ohio Civil Service laws who have failed or who will fail to provide sufficient due process procedures prior to the removal or suspension of classified civil service employees.

9. Defendant Cleveland Civil Service Commission represents all civil service commissions in the State of Ohio who have failed or who will fail to afford sufficiently prompt hearings under the due process clause for removed or suspended civil service employees.

10. Plaintiff's class is so numerous as to make it impracticable to bring them all before the court, there are questions of law and fact common to the class, the claims of the plaintiff are typical of the claims of the class, and he will fairly and adequately protect the interests of the class.

11. The Defendants' classes are so numerous as to make it impracticable to bring them all before this Court, there are questions of law and fact common to the member of the classes, the defenses of the Defendants are typical of the defenses of the class, and the Defendants will fairly and adequately protect the interests of the class.

CAUSE OF ACTION

12. The Plaintiff worked in the summer of 1979 as a security guard for a private security firm which provided guards to the Cleveland City School District under contract.

13. Said firm went defunct and the plaintiff began working for the defendant Cleveland Board of Education on September 22, 1979.

14. On September 25, 1979 the plaintiff filled out an application for a non-teaching position as a security guard with said defendant.

[4] 15. The plaintiff stated in said application that he had never been convicted of a felony and he was hired as a security guard with the Business Department of the Defendant Cleveland Board of Education. The plaintiff was a classified civil service employee pursuant to the civil service laws of the State of Ohio who had a legitimate claim of continued employment absent sufficient "cause" for removal.

16. On September 1, 1980 the plaintiff was transferred to the jurisdiction of the newly formed Department of Safety and Security.

17. A record check was conducted on all employees in said department in October, 1980 which revealed that the plaintiff was convicted of grand larceny in 1968.

18. On November 3, 1980, George Mazzaro, Business Manager for the Defendant Cleveland Board of Education sent a letter to the plaintiff advising him that he was being removed from his employment for dishonesty.

19. The plaintiff was not given any opportunity prior to his removal to respond to the charges against him

although he had a legitimate defense since he thought that he was convicted of a misdemeanor.

20. The plaintiff filed a Notice of Appeal of his removal with the defendant Cleveland Civil Service Commission on November 12, 1980. A hearing before a referee of said defendant was originally scheduled for January 22, 1981 but was continued until January 29, 1981 when a hearing was actually held.

21. The referee filed and served his recommendations on or about April 1, 1981. A hearing was held before the full civil service commission on July 29, 1981 which announced its decision that it would affirm the plaintiff's removal.

22. The defendant Cleveland Civil Service Commission approved a proposed findings of fact and conclusions of law on August 10, 1981 and advised plaintiff's attorneys of said fact by letter dated August 21, 1981.

[5] 23. The plaintiff was denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution by the defendants Cleveland Board of Education and Cleveland Civil Service Commission when he was given no opportunity prior to his removal to respond to the charges against him and when he was denied a speedy resolution to his claim that his removal was unlawful and unfair.

24. The plaintiff suffered loss of compensation and other benefits, plus mental distress and anguish, anxiety, humiliation and embarrassment and loss of credit and reputation. The plaintiff has been prevented from obtaining suitable employment because of the reasons of his removal and the record thereof.

25. Ohio Revised Code Section 124.34 is unconstitutional on its face because it provides no opportunity for a classified civil service employee to respond to the charges against him prior to his removal or suspension.

26. Ohio Revised Code Section 124.34 is unconstitutional as applied because the thirty (30) day time limit for an appeal hearing has been determined not to be mandatory and because classified civil service employees are not given sufficiently prompt post-removal or post-suspension hearings.

WHEREFORE, the plaintiff prays for the following relief:

1. That he be reinstated to his position and awarded his back-pay and other benefits plus simple interest for the time that he was unlawfully deprived of his employment, and

2. Compensatory damages in the amount of One hundred thousand dollars ($100,000.00), and

3. A judgment declaring Ohio Revised Code Section 124.34 unconstitutional on its face and as applied, and

4. Preliminary and Permanent Injunctions prohibiting the removal or suspension of classified civil service employees without full compliance with the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution, and

[6] 5. Preliminary and Permanent Injunctions ordering reinstatement with full back pay and other benefits plus interest, and

6. Certification of this case as a class action; and

1. That the Defendants be ordered to pay the plaintiff for his costs in prosecuting this case including a sum for his reasonable attorney fees.

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By: Jesse W. Horace and Roscoe M. Fuerst,
Attorneys at Law

Case No. C81-2123

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Ohio
Eastern Division

RICHARD DONNELLY, Individually and on behalf of all others similarly situated,
Plaintiff,
vs.
PARMA BOARD OF EDUCATION ROBERT M. KOSCIELNY, PRESIDENT Individually and on behalf of all others similarly situated,
and
CITY OF PARMA JOHN PETRUSKA, MAYOR, Individually and on behalf of all others similarly situated,
and
PARMA CIVIL SERVICE COMMISSION LEO HEPNER, CHAIRMAN, Individually and on behalf of all others similarly situated,
and
LEO HEPNER,
and
RALPH SCHEEL,
and
DONALD NARUS,
and
WILLIAM J. BROWN, Attorney General, State of Ohio,
Defendants.

COMPLAINT FOR MONETARY INJUNCTIVE AND DECLARATORY RELIEF

(Filed October 27, 1981)

[2] JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to 28 United States Code Sections 1343 (3) and 4, 2201. This is an action for damages, injunctive and declaratory relief authorized by 42 United States Code Section 1983 to be commenced by the Plaintiff and the class he represents, as a citizen of the United States, to redress the deprivation, by Defendants' actions under color of Ohio Revised Code Section 124.34, of rights served by the Fourteenth Amendment to the Constitution of the United States.

2. Jurisdiction is also conferred on this court by 28 United States Code Section 1331 this being a suit wherein the matter in controversy exceeds the sum of Ten thousand dollars ($10,000.00), exclusive of interests and costs, arising under the Constitution and laws of the United States.

PARTIES

3. The Plaintiff is a resident of the City of Independence, County of Cuyahoga and State of Ohio and is a citizen of the United States and was a classified civil service employee pursuant to the laws of the State of Ohio.

4. Defendant Parma Civil Service Commission is an organizational division of the Defendant City of Parma.

5. Defendant William J. Brown is the Attorney General of the State of Ohio and is named as a party defendant in this action solely because the constitutionality of a certain Ohio Statute is being drawn into question. None of the allegations that follow apply to William J. Brown and no relief [3] is sought against him.

7. Defendants Leo Hepner, Ralph Scheel and Donald Narus are members of the Parma Civil Service Commission and are sued individually and in their official capacities.

CLASS ACTION

8. Plaintiff brings this action pursuant to Rules 23 (a), 23 (b)(4)(B) and 23 (b)(2) of the Federal Rules of Civil Procedure. Plaintiff's class consists of all classified civil service employees in the State of Ohio who have been or who could be suspended or removed from their employment without sufficient due process procedures.

9. Defendant Parma Board of Education represents all appointing authorities in the State of Ohio pursuant to the Ohio Civil Service laws who have failed or who will fail to provide sufficient due process procedures prior to the removal or suspension of classified civil service employees.

10. Defendant Parma Civil Service Commission represents all civil service commissions in the State of Ohio who have failed or who will fail to afford sufficiently prompt hearings under the due process clause for removed or suspended civil service employees.

11. Plaintiff's class is so numerous as to make it impracticable to bring them all before the court, there are questions of law and fact common to the class, the claims of the plaintiff are typical of the claims of the class, and he will fairly and adequately protect the interests of the class.

12. The Defendants' classes are so numerous as to make it impracticable to bring them all before this Court, there are questions of law and fact common to the member of the classes, the defenses of the Defendants are typical of the defenses of the classes, and the Defendants will fairly and adequately protect the interests of the class.

CAUSE OF ACTION

13. The Plaintiff is a bus mechanic with the Defendant Parma Board of Education who is a classified employee pursuant to the civil service laws of [4] the State of Ohio who had a legitimate claim of continued employment absent sufficient "cause" for his removal.

14. The Plaintiff was advised by letter dated August 17, 1977 that he would be removed from his employment because of his failure to pass an eye-examination.

15. The Plaintiff was given no opportunity prior to his removal to respond to the charges against him except that he was permitted to take another eye-examination.

16. The Plaintiff had a legitimate defense to his removal because another employee who could not pass an eye-examination was not removed.

17. The Plaintiff's order of removal was not filed the Defendant Parma Civil Service Commission until September 9, 1977.

18. The Plaintiff filed a Notice of Appeal with said Defendant on August 31, 1977. Said Defendant refused to hear the Plaintiff's appeal because it was not filed within ten (10) days after the order of removal was mailed.

19. However the appeal period to the civil service commission pursuant to Ohio Revised Code Section 124.34 does not commence until the orders of removal is filed with civil service commission.

20. The plaintiff filed a Complaint for a writ of mandamus in the Cuyahoga County Court of Appeals on May 9, 1978, case number 39370. An alternative writ of mandamus was issued by Judge Corrigan.

21. At the hearing on the alternative writ of mandamus it was agreed that the plaintiff would have an appeal hearing within thirty (30) days.

22. Said hearing was conducted on May 30, 1978 and the Defendant Parma Civil Service Commission ordered the Plaintiff reinstated on July 6, 1978.

23. The Plaintiff was denied Equal Protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution by the Defendant Parma Board of Education when another mechanic who could not pass an eye-examination was not removed.

24. The Plaintiff was denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution by the Defendants [5] Parma Board of Education, Parma Civil Service Commission, and its individual members when he was given no opportunity prior to his removal to respond to the charges against him and when he was denied a speedy resolution of his claims that his removal was unlawful and unfair.

25. The Plaintiff was denied his rights to substantive time due process as guaranteed by the Fourteenth Amendment to the United States Constitution when the Defendant Parma Board of Education arbitrarily and discriminately removed him from his employment because the eye-examination was not reasonably related to his job duties.

26. The Plaintiff was denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution by the Defendants Parma Civil Service Commission Leo Hepner, Ralph Scheel, and Donald Narus when said Defendants failed to follow established state procedures as described in this Complaint.

27. The Plaintiff suffered loss of compensation and other benefits, plus mental distress and anguish, anxiety, humiliation and embarrassment and loss of reputation.

28. Ohio Revised Code Section 124.34 is unconstitutional on its face because it provides no opportunity for a classified civil service employee to respond to the charges against him prior to his removal or suspension.

29. Ohio Revised Code Section 124.34 is unconstitutional as applied because the thirty (30) day time limit for an appeal hearing has been determined not to be mandatory and because classified civil service employees are not given sufficiently prompt post-removal or post-suspension hearings.

WHEREFORE, Plaintiff prays for the following relief:

1. That he be awarded his back pay and other benefits plus simple interest for the time that he was unlawfully deprived of his employment; and

2. Compensatory damages in the amount of Twenty-five thousand dollars ($25,000.00); and

[6] 3. A judgment declaring Ohio Revised Code Section 12-3- unconstitutional on its face and as applied; and

4. Preliminary and Permanent Injunctions prohibiting the removal or suspension of classified civil service employees without full compliance with the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution; and

5. Certification of this case as a class action; and

6. That the Defendants be ordered to pay the Plaintiff for his costs in prosecuting this case including a sum for his reasonable attorney fees.

Respectfully submitted,

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By: John W. Rickey and Roscoe M. Pierce,

Attorneys at Law

MATTERS CONTAINED IN PETITIONS FILED IN CASE NO. 83-1362 (LOUDERMILL) AND CASE NO. 83-1363 (DONNELLY)

Decision/Order	Donnelly Petition (83-1363)	Loudermill Petition (83-1362)
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AMICUS CURIAE

BRIEF

Office-Supreme Court, U.S.
FILED
JUL 30 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 83-1362, 83-1363, 83-6392

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

CLEVELAND BOARD OF EDUCATION,
Petitioner
vs.
JAMES LOUDERMILL,
Respondent

PARMA BOARD OF EDUCATION,
Petitioner
vs.
RICHARD DONNELLY,
Respondent

JAMES LOUDERMILL,
Cross-Petitioner
vs.
CLEVELAND BOARD OF EDUCATION, et al.,
Cross-Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION OF CLEVELAND FOUNDATION AS AMICUS CURIAE

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QUESTIONS PRESENTED

I. WHETHER THE DUE PROCESS CLAUSE REQUIRES, AS A MINIMUM, THAT, ABSENT EXTRAORDINARY CIRCUMSTANCES, A CLASSIFIED CIVIL SERVICE EMPLOYEE BE GRANTED AN OPPORTUNITY TO RESPOND ORALLY OR IN WRITING PRIOR TO BEING DEPRIVED OF HIS PROTECTED PROPERTY INTEREST IN GOVERNMENT EMPLOYMENT?

II. WHETHER DELAYS OF MORE THAN NINE (9) MONTHS BEFORE A CLASSIFIED CIVIL SERVICE EMPLOYEE IS GRANTED A DECISION ON HIS POST-TERMINATION ADMINISTRATIVE APPEAL VIOLATE THE DUE PROCESS CLAUSE?

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INTEREST OF AMICUS CURIAE*

The American Civil Liberties Union of Cleveland Foundation is a chapter of the American Civil Liberties Union, a nationwide, nonpartisan not-for-profit organization dedicated to the preservation of the civil rights and liberties guaranteed to all Americans by the Bill of Rights.

Since its founding in 1920, the American Civil Liberties Union, in furtherance of its historic mission, has appeared frequently in this Court and in other courts, as counsel for a party and as an amicus curiae, in cases raising due process challenges to federal and state

*Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

governmental actions infringing upon protected property and liberty interests, including those of classified civil service employees.

In this case we ask this Court to reaffirm its numerous prior holdings that, absent an emergency, the due process clause of the fourteenth amendment requires some kind of hearing before an individual is deprived of a protected property interest. Amicus also asks this Court to hold that the due process clause requires a prompt post-discharge hearing.

STATEMENT OF THE CASE

The full factual background of the case and the opinion of the court below are reported in Loudermill v. Cleveland Board of Education, 721 F.2d 550 (6th Cir. 1983). Nevertheless, we believe it is important to set forth certain of the undisputed facts in detail.

Prior to their summary discharges by their municipal employers, James Loudermill and Richard Donnelly were classified civil service employees who could be discharged only for "cause" under the governing state statute, Ohio Rev. Code Ann. § 124.34 (Page 1978). Loudermill v. Cleveland Board of Education, supra, 721 F.2d at 551-552. Loudermill and Donnelly were summarily sent discharge notices by their municipal employers; neither was given any

opportunity to respond to the charge against him, either orally or in writing, prior to his discharge.

Loudermill and Donnelly were permitted to file an appeal with their respective civil service commissions following their discharge but neither appeal was "completed" until over eight months following the challenged discharge. Id. at 553-554. This delay did not violate state law inasmuch as the thirty-day time limit contained in Ohio Rev. Code Ann. § 124.34 (Page 1978) has been construed by the Ohio courts to be merely a guide and not a strict requirement. In re Bronkar, 53 Ohio Misc. 13, 17, 372 N.E.2d 1345, 1347 (1977).

James Loudermill was hired by his municipal employer, the Cleveland Board

of Education, as a security guard in September, 1979. At that time he completed an employment application on which he responded "No" to the question, "Have you ever been convicted of a crime (felony)?". At the end of this application Loudermill signed a statement which provided in relevant part: "I certify that all the statements made by me in this application are true, complete and correct to the best of my knowledge . . . ." Id. at 552. More than a year later a routine records check disclosed that Loudermill had been convicted of a felony in 1968, eleven years prior to his employment by the Cleveland Board of Education. Loudermill was then summarily notified by letter that he was being discharged on the grounds of dishonesty in filling out the employment application.

If Loudermill had been given any opportunity to respond to the charge before his discharge he claims he could have demonstrated his honesty and rebutted the charge against him inasmuch as he believed he had been convicted of a misdemeanor rather than a felony. Loudermill filed his appeal with the Cleveland Civil Service Commission nine days after his discharge. Id. at 553. Over eight months later the commission, by a vote of 3-2, affirmed Loudermill's discharge and rejected the recommendation of the referee that he be reinstated. The referee, the only official to hear testimony on the matter, specifically found that Loudermill had made an honest mistake concerning his conviction more than a decade before. See Loudermill's Cross-Petition for Writ of Certiorari at 2.

Richard Donnelly was employed as a bus mechanic by the Parma Board of Education. The Parma Board of Education summarily sent Donnelly a notice of discharge on August 17, 1977 because of his failure to pass an eye examination. The Board did not give Donnelly any opportunity whatsoever to respond to the charge, although he was afforded the chance to retake the eye examination. If, prior to his discharge, Donnelly had been given an opportunity to inform the Board that it still employed another bus mechanic who had failed the eye examination, the Board might have scrutinized the purported reason for the discharge and the efficacy of the eye examination requirement more closely and not discharged Donnelly. Thereafter Donnelly appealed his discharge to the

Parma Civil Service Commission which, after a delay of over nine months, ordered him reinstated, but apparently lacked the power to award back pay. Loudermill v. Cleveland Board of Education, supra 553-554. The effect of Donnelly's reinstatement without back pay was merely to convert his discharge into an uncompensated suspension. See Parma Board of Education's Petition for Writ of Certiorari at 5.

Thereafter Loudermill and Donnelly commenced the instant civil actions in federal district court, alleging that the defendants' failure to give them an opportunity before dismissal to challenge their discharges, as well as a prompt post-termination hearing, violated their fourteenth amendment rights to procedural due process. The United States District Court for the Northern District of Ohio,

John M. Manos, District Judge, dismissed both actions for failure to state a claim upon which relief can be granted. The cases were consolidated on appeal. With respect to the pre-termination due process claims the Sixth Circuit Court of Appeals reversed and held that a tenured municipal employee must be given some opportunity, either orally or in writing, to present evidence on his own behalf prior to discharge. No full-scale evidentiary hearing was required. In regard to the more than nine month delays in the post-termination appeal process the Sixth Circuit Court of Appeals found no constitutional violation and affirmed tne District Court. Loudermill v. Cleveland Board of Education, supra, at 551-552. Thereafter, this Court granted the petitions and cross-petitions for certiorari.

SUMMARY OF THE ARGUMENT

In this case amicus urges this Court to reaffirm its consistent prior holdings that, absent extraordinary circumstances, the due process clause of the fourteenth amendment requires that a tenured government employee be given an opportunity to respond, orally or in writing, to the charge against him prior to termination. See, e.g., Davis v. Scherer, 52 U.S.L.W. 4956, 4958 n.10 (1984).

Any balancing of interests to determine whether the government employee is entitled to this fundamental right of a prior opportunity to be heard would be inappropriate. Fuentes v. Shevin, 407 U.S. 67, 90 n.21 (1972). Nevertheless, there is a grave danger of error in summary termination decisions which can

be easily minimized by allowing the tenured employee an opportunity to respond to the charge against him. Cf. Goss v. Lopez, 419 U.S. 565 (1975). The tenured government employee has a significant interest in continued employment and the government's interest in an erroneous termination is nonexistent. The procedural protection sought here will impose no cognizable cost upon the State.

This Court should reaffirm its holdings that an individual may not be deprived of constitutionally guaranteed due process rights simply because the State did not statutorily provide them. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 431-432 (1983).

Finally, a delay of over nine months before a tenured government employee is

granted a decision on his post-termination administrative appeal is unreasonable and violative of the fourteenth amendment due process clause. Cf. Barry v. Barchi, 443 U.S. 55 (1979).

ARGUMENT

I. ABSENT EXTRAORDINARY CIRCUMSTANCES, THE DUE PROCESS CLAUSE REQUIRES, AS A MINIMUM, AN OPPORTUNITY TO RESPOND ORALLY OR IN WRITING BEFORE AN INDIVIDUAL IS DEPRIVED OF A PROTECTED PROPERTY INTEREST IN GOVERNMENT EMPLOYMENT.

The interest which we advance in this case was perhaps best summarized by Justice Frankfurter in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170, 171-172 (1952) (concurring opinion):

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.
>
> . . . .

> The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

This Court has steadfastly held that some kind of hearing is required before a person is finally deprived of a protected property interest. See Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267 (1975). In his survey of the elements of a fair hearing required by the due process clause, Judge Friendly concluded that a prior "Opportunity to Present Reasons why the Proposed Action Should

Not Be Taken" is "fundamental". Friendly, supra, 123 U. Pa. L. Rev. at 1281.

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950), Justice Jackson, writing for the Court, concluded:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

It is the contention of amicus that a tenured government employee has a fundamental due process right to an opportunity to present reasons why he should not be terminated, either orally or in writing, before he is discharged. This Court has repeatedly recognized that

such a government employee has a right to some kind of hearing prior to discharge. See, e.g., Davis v. Scherer, 52 U.S.L.W. 4956, 4958 n.10 (1984); id. at 4960-4961 (Brennan, J., concurring in part and dissenting in part); Arnett v. Kennedy, 416 U.S. 134, 170-171 (1974) (Powell & Blackmun, J.J., concurring); id. at 195-196 (White, J., concurring in part and dissenting in part); id. at 206 (Marshall, Douglas & Brennan, J.J., dissenting); Board of Regents v. Roth, 408 U.S. 564, 569-570 & n.7 (1972).

In this case the Court is not asked to determine the full content of such pre-termination hearing. Instead this Court is only asked to confirm that a government employee is entitled to the same minimal pre-deprivation right to respond orally or in writing to the

charge against him which is guaranteed to public school students. See Goss v. Lopez, 419 U.S. 565 (1975).

A. This Court Has Consistently Held That, Absent Extraordinary Circumstances, The Due Process Clause Requires Some Kind Of Prior Hearing Whenever A Protected Property Interest is Invaded.

It is a fundamental principle of the English common law, the source of the due process clause of the fourteenth amendment, that an individual must be afforded an opportunity to be heard before being subjected to the deprivation of liberty or property. This is clear from the oft-cited statement of Lord Loreburn in Board of Education v. Rice, [1911] A.C. 179, 182:

> I need not add that . . . they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who

> decides anything . . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

Indeed this principle is so basic that it is considered one of the few principles of "natural justice" from which no administrator may depart. See Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170 n.17 (1951) (Frankfurter, J., concurring).

It is not surprising, therefore, that this Court has consistently held that the due process clause requires, absent extraordinary circumstances, some kind of a prior hearing whenever the deprivation

of a protected property interest is threatened by the government.

In Goldberg v. Kelly, 397 U.S. 254 (1970), this Court ruled that, despite the fact that a terminated welfare recipient was entitled by statute to an adequate hearing within ten days, the due process clause required an administrative hearing prior to the termination of benefits. It is noteworthy that the pre-termination protections afforded welfare recipients and found inadequate in Goldberg were more extensive than those sought by the discharged government employees in the instant case. In Goldberg, the welfare recipient was entitled to seven (7) days written notice of intent to terminate benefits and the right to a personal meeting with a case-worker and to file a written statement

with a supervisor prior to the termination. Id. at 258-259. The tenured civil service employee in Ohio presently has none of these rights.

In Bell v. Burson, 402 U.S. 535, 542 (1971), the Court ruled that a hearing must precede the suspension of a driver's license. Again the procedures that the state statute provided were more protective than those afforded classified civil service employees in Ohio. The statute at issue in Bell at least granted a prior hearing on the issue of whether the person whose property was threatened was properly identified. In Ohio government employees are given no pre-termination protection of any kind.

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) and Fuentes v. Shevin, 407 U.S. 67 (1972) also support the

principle that the due process clause requires some sort of hearing prior to the deprivation of a protected property interest. In Fuentes this Court invalidated state pre-judgment replevin provisions on the ground that:

> The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments.
>
> . . . .
>
> [T]he Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes place.

Id. at 82 (emphasis added). See also North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).[1]

1. In North Georgia Finishing the Court distinguished the intervening case of Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), on the grounds that the

Fuentes did recognize that "truly unusual" and "extraordinary situations" could justify postponement of a hearing. 407 U.S. at 90. In such cases there must be "a special need for very prompt action." Id. at 91. Thus, this Court has not required a hearing prior to emergency action required by the exigencies of war, see, e.g., Bowles v. Willingham, 321 U.S. 503, 521 (1944); or bank failure, see, e.g., Fahey v. Mallonee, 332 U.S. 245 (1947). Similarly the court has found exigent circumstances where immediate action was necessary to protect consumers from contaminated food, North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908), or

deprivation in Mitchell occurred only after the issuance of a writ by a judge and that state law provided for an immediate post-deprivation hearing. Neither ground is applicable in the instant case.

misbranded drugs, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).[2]

None of these truly rare extraordinary circumstances are applicable here. Indeed, it cannot even be contended that summary discharge was necessary in this case to protect the government from serious disruption in the workplace. Cf. Goss v. Lopez, 419 U.S. 565, 582-583 (1975). Nor is the governing state statute limited to such exigent situations. In this case both the tenured government employees were valuable and efficient public servants who were summarily discharged for reasons which have not been shown to have been related to job performance.

2. See also Haig v. Agee, 453 U.S. 280, 309-310 (1981) (national security) and Bob Jones University v. Simon, 416 U.S. 725 (1974) (effective tax collection).

In Board of Regents v. Roth, 408 U.S. 564 (1972) this Court again recognized the general rule that some sort of prior hearing is required before a tenured government employee can be discharged:

> When protected interests are implicated, the right to some kind of prior hearing is paramount.

Id. at 569-570 (footnote omitted).

This holding in Roth is only just when this Court has held that a hearing is required before one's parole may be revoked, Morrissey v. Brewer, 408 U.S. 471 (1972), or a prisoner's "good-time" credits may be withheld, Wolff v. McDonnell, 418 U.S. 539 (1974). Again it should be emphasized that the government employees here are seeking less procedural protection than the Court found appropriate in Morrissey and Wolff.

Arnett v. Kennedy, 416 U.S. 134 (1974), is not contrary to the position of amicus herein. In Arnett, a majority of the justices of this Court explicitly found that the procedures statutorily afforded to the government employee there met the minimum requirements of the due process clause. See id. at 170-171 (Powell & Blackmun, J.J., concurring); id. at 195-196 (White, J., concurring in part and dissenting in part); id. at 206 (Marshall, Douglas & Brennan, J.J., dissenting). It is significant that in Arnett the statutory pre-termination procedures provided for access to the materials upon which the charge was based, the right to respond orally and in writing to the charges, and the right to present rebuttal affidavits. Id. at 140-143. The tenured government employ-

ees herein were given none of these protections and seek only the right to respond to the charge against them orally or in writing.

In essence the claim here is that tenured government employees facing the loss of their job are entitled to the same due process right to informally respond to the charges against them that this Court has granted to public school students facing a few days suspension from the classroom. See Goss v. Lopez, 419 U.S. 565 (1975).[3] It would be

3. Ingraham v. Wright, 430 U.S. 651 (1977), is not relevant to the instant case. Ordinarily disruption of the public institution is involved and the disciplinary infractions are directly observed by the teacher. Cf. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 n.24 (1978). In addition, common experience informs us that a child about to be paddled always expresses his side of the story, in one way or another.

perverse if a tenured teacher were held to have less due process protection than her student.

Neither Dixon v. Love, 431 U.S. 105 (1977), nor Mackey v. Montrym, 443 U.S. 1 (1979) are contrary to the position of amicus herein. Both involved exigent circumstances where the public safety required "the prompt removal of a safety hazard" from the roads and highways. Dixon v. Love, 431 U.S. at 114. Moreover, in Mackey this Court noted that a hearing was available contemporaneously with the suspension of the driver's license, 443 U.S. at 7, and "[a]t the very least, the arresting officer ordinarily will have provided the driver with an informal opportunity to tell his side of the story." Id. at 14. In the instant case the tenured government

employees are seeking no more due process protection than this Court assumed police officers afford suspected drunk drivers.

In Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 16 (1978), a case dealing with summary termination of utility services, this Court again recognized the basic principle relied upon by amicus herein. It is axiomatic that a classified civil service employee facing the devastating loss of employment should be entitled to as much due process as a utility customer threatened with a loss of service. The tenured government employees herein are asking no more and, under the due process clause of the fourteenth amendment, are entitled to no less.

Three recent employment cases clearly support the fundamental principle that

the due process clause requires some kind of prior hearing. In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1983), this Court held that a hearing is required before a claim for unemployment compensation can be denied. Furthermore, in Barry v. Barchi, 443 U.S. 55, 65 (1979), dealing with the suspension of a harness racehorse trainer's license, the Court, recognizing the need for some kind of pre-suspension due process procedures, held:

> [A]lthough Barchi was not given a formal hearing prior to the suspension of his license, he was immediately notified of the alleged drugging, 16 days elapsed prior to the imposition of the suspension, and he was given more than one opportunity to present his side of the story to the State's investigators. (Emphasis added).

Finally, in Davis v. Scherer, 52 U.S.L.W. 4956 (1984), four members of this Court found that the constitutional requirement of an opportunity to be heard prior to termination of a protected property interest in government employment was "'clearly established' long before October 25, 1977." Id. at 4960 (Brennan, Marshall, Blackmun & Steven, J.J., dissenting). The majority in Davis agreed that "the decisions of this Court by 1978 had required 'some kind of hearing' . . . prior to discharge of an employee who had a constitutionally protected property interest in his employment." Id. at 4958. Indeed, the disagreement between the majority and dissent, insofar as it is relevant here, focused on whether the due process requirement of a prior opportunity to be

heard was satisfied where the employee "was informed several times of the Department's objection . . . and took advantage of several opportunities to present [his response]." Id. This, of course, was far more due process than the tenured government employees in the instant case were given or are asking.

This Court's holdings in Hudson v. Palmer, 52 U.S.L.W. 5052 (1984) and Parratt v. Taylor, 451 U.S. 527 (1981) are not contrary to the position of amicus. In this case there existed neither the "necessity for quick action by the State" nor the "impracticability of providing any meaningful predeprivation process." Id. at 539. Hudson and Parratt by their terms only apply when the deprivation of property is caused by the random and unauthorized conduct of a

state employee. Hudson v. Palmer, 52 U.S.L.W. at 5056.

In essence, it is the position of the amicus herein that, at a minimum and in the absence of extraordinary circumstances, classified civil service employees with a protected property interest in their government employment should not be confronted with an impersonal, autocratic, and unexplained administrative decision that leaves them bewildered, confused, and jobless, and then have to wait months for a post-termination hearing in order to have an initial opportunity to correct or clarify what might well be a bureaucratic error. Simply stated, the due process clause of the fourteenth amendment requires that such a government employee be given, at a minimum, an opportunity to respond, ver-

bally or in writing, to the charge against him prior to his termination. See Davis v. Scherer, 52 U.S.L.W. 4956, 4958 (1983); id. at 4960 (Brennan, J., dissenting); Board of Regents v. Roth, 408 U.S. 564, 569-570 n.7 (1972). Cf. Goss v. Lopez, 419 U.S. 565 (1975).

B. A Balancing Of The Magnitude Of The Private Interest In Continued Government Employment, The Grave Risk Of Erroneous Deprivation And The Insubstantial Government Interest In Routine Summary Dismissals Of Its Employees Confirms The Constitutional Requirement Of A Prior Opportunity To Respond.

In Mathews v. Eldridge, 424 U.S. 319, 334-335 (1976), this Court held:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such an interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Although a balancing of the Mathews factors strongly supports the efficacy of an opportunity to respond, orally or in writing, prior to the termination of a protected interest in government employment, such a balancing would be inappropriate in the instant case. This Court has repeatedly held that the Mathews balancing test is relevant only to the issue of the specific dictates of due process, not to the recognition of the

fundamental right to some kind of prior hearing. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 433-434 (1983); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 16-17 (1978); Goss v. Lopez, 419 U.S. 565, 575-576 (1975). This basic principle was most clearly stated by this Court in Fuentes v. Shevin, 407 U.S. 67, 90 n.21 (1972):

> The relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process. . . . But some form of notice and hearing--formal or informal--is required before deprivation of a property interest that "cannot be characterized as de minimis." Sniadach v. Family Finance Corp., supra, at 342 (Harlan, J. concurring) (emphasis in original).

In Matthews this Court only proceeded to balance the relevant factors after it

had first decided: "[t]his Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." 424 U.S. at 333. This Court thereafter engaged in the balancing of interests only to determine whether Eldridge was entitled to more than merely an opportunity to comment in writing prior to the termination of his Social Security benefits. Id. at 324, 338, 346.

In the instant case the Ohio classified civil service employees were denied any right to respond to the charge against them, either orally or in writing, prior to their termination. Thus, since the issue in this case is simply the availability of the most minimal due process rights, it would be inappropriate for the Court to engage in a balancing of the factors test.

It is equally clear, however, that a balancing of the relevant factors set forth in Mathews simply confirms the constitutional necessity of guaranteeing an opportunity to respond, orally or in writing, prior to the termination of protected government employment. It cannot be doubted that the private interest in continued government employment, by those who have a protected property interest in their jobs, is significant. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1983).

Justice Marshall eloquently explicated the gravity of a loss of employment in Arnett v. Kennedy, 416 U.S. 134, 220-21 (1974) (dissenting opinion):

> Many workers, particularly those at the bottom of the pay scale, will suffer severe and painful economic dislocations from even a temporary loss of wages. . . . The loss of

> income for even a few weeks may well impair their ability to provide the essentials of life--to buy food, meet mortgage or rent payments, or procure medical services. . . .
>
> A child's education may be interrupted, a family's home lost, a person's relationship with his friends and even his family may be irrevocably affected.

Moreover, there are important intangible private interests at stake when a tenured government employee is discharged. As the court below recognized, "Employment provides not only financial livelihood, but frequently self-esteem and social status." Loudermill v. Cleveland Board of Education, 721 F.2d 550, 561 (6th Cir. 1983). Finally, a tenured government employee has a significant interest in "being personally talked to about the decision rather than

simply being dealth with." L. Tribe, American Constitutional Law 504 (1978) (emphasis in original). In other words, the due process clause, in addition to serving to prevent erroneous deprivations, also has as a central purpose "the promotion of participation and dialogue by affected individuals in the decision-making process." Marshall v. Jerrico, Inc., 446, U.S. 238, 242 (1980).

It is irrelevant that the deprivation may be only temporary. "This court has not . . . embraced the general proposition that a wrong may be done if it can be undone." Fuentes v. Shevin, 407 U.S. 67, 82 (1972), quoting Stanley v. Illinois, 405 U.S. 645, 647 (1972).

The second factor of the Mathews balancing test, the gravity of the risk

of erroneous deprivation absent procedural protection, also compels the conclusion that, at a minimum, the due process clause guarantees a tenured government employee the opportunity to respond to the charge against him prior to termination of employment. The present Ohio system of summary termination is the essence of arbitrariness inasmuch as it wholly substitutes a bureaucratic edict in place of reasoned factfinding. In the often highly charged atmosphere of the workplace, the possibility of an erroneous decision to terminate an employee is significant. Often such errors are the result of personal animosities, mistaken identity, unreliable information sources, cloudy memories or faulty perceptions. See Arnett v. Kennedy, 416 U.S. 134, 214 (1974) (Marshall, J., dissenting).

As this Court found in Goss v. Lopez,

419 U.S. 565, 580 (1975):

> Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.
>
> . . .
>
> But it would be a strange disciplinary system in [a governmental] institution if no communication was sought by the disciplinarian with the [employee] in an effort to inform him of his dereliction and let him tell his side of the story in order to make sure that an injustice is not done.

The validity of the Court's observation in Goss is confirmed by the wisdom of Justices Frankfurter and Holmes:

> [A]n admonition of Mr. Justice Holmes becomes relevant. "One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point." . . . ." The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed the meddlesome, and the corrupt to play the role of informer undetected and uncorrected." . . . Appearances in the dark are apt to look different in the light of day.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-171 (1951) (Frankfurter, J., concurring), quoting United States ex. rel. Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Frankfurter, J. dissenting).

Government employers are not immune to the same human vices and foibles that have given rise to a recognition of the need for due process protection in other

areas. They can and do make mistakes, they can and do act arbitrarily, discriminatorily and unconstitutionally. See, e.g., Branti v. Finkel, 445 U.S. 507 (1980); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Abraham v. Pekarski, 728 F.2d 167 (3rd Cir. 1984). Some degree of pre-termination procedural protection for the tenured government employee is essential.

A post-termination hearing is an inadequate substitute for a pre-termination opportunity to respond to the charge, not only because of the inherent delay and hardship to the individual but, more importantly, because there is a significant danger that the post-termination hearing may result in an after the fact rationalization for a

bureaucratic decision which has already been made. See L. Tribe, American Constitutional Law 544 (1978).

On the other hand, a pre-termination opportunity to respond to the charge operates as a significant protection against improprieties and errors by guaranteeing that the values of accuracy, accountability, visibility, integrity and consistency are met. Cf. Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

Insofar as the third prong of the Mathews balancing formula, the weight of governmental interest, is concerned, it is clear that there is no substantial state interest in denying a tenured government employee the opportunity to respond to the charge against him before being discharged.

Any marginal, if not non-existent, administrative burden cannot outweigh the constitutionally protected right to due process. See, e.g., Fuentes v. Shevin, 407 U.S. 67, 90 (1972); Stanley v. Illinois, 405 U.S. 645, 656 (1972); Bell v. Burson, 402 U.S. 535, 540-541 (1971). This is particularly true where the minimal due process procedure sought to be imposed on the state is no more than that which would be self-imposed by any professional, conscientious administrator. Cf. Goss v. Lopez, 419 U.S. 565, 583 (1975):

> [W]e do not believe that we have imposed procedures on . . . disciplinarians which are inappropriate. . . . Instead, we have imposed requirements which are, if anything, less than a fair-minded [administrator] would impose upon himself in order to avoid unfair suspensions.

Moreover, the discharge of a tenured government employee imposes significant costs upon the government which cannot be ignored. Such a discharge causes the loss of all the personnel investments already made in the employee: recruitment, selection, training and evaluation. In addition, when the discharged employee is replaced the same costs must be incurred by the government a second time. If the terminated employee is later reinstated the government will then have to bear the burden of a returning employee imbued with cynicism and frustration over his unjust treatment. In brief, the government shares the individual's interest in a prompt and accurate pre-termination procedure. Cf. Morrissey v. Brewer, 408 U.S. 471, 484 (1972).

In conclusion, a pre-termination opportunity to respond to the charges against him will serve the interests of both the tenured government employee and the government employer at virtually no expense, and probably a net financial gain, for the government. See, e.g., Loudermill v. Cleveland Board of Education, 721 F.2d 550, 562 (6th Cir. 1983); Vanelli v. Reynolds School Dist., 667 F.2d 773, 779 (9th Cir. 1982); Thurston v. Dekle, 531 F.2d 1264, 1272-1273 (5th Cir. 1976).

C. An Individual May Not Be Deprived Of Constitutionally Guaranteed Due Process Rights By The Niggardly Procedures Afforded By A State Statute.

In the instant case it is undisputed that Loudermill and Donnelly have a protected property interest in their

government employment by virtue of Ohio Rev. Code Ann. § 124.34 (Page 1978) and could not be terminated other than "for cause". Simply because this property interest is created by a state statute, however, it does not follow that the State may emasculate the due process procedural guarantees mandated by the fourteenth amendment to the United States Constitution by the expediency of specifying lesser procedures in the same state statute.

Allowing the State to condition its grant of a property right upon inadequate procedural protections would be contrary to the entire corpus of this Court's right-privilege decisions. See W. Van Alstyne, Cracks in "The New Property": Adjudicative Due Process in the Administrative State, 62 Corn. L. Rev. 445, 462 (1977).

Requiring a government employee to forfeit his constitutionally guaranteed due process rights as a condition of acceptance of a statutorily conferred property interest would repudiate "one hundred years of settled Supreme Court practice . . . ." D. Simon, Liberty and Property in the Supreme Court: A Defense of Roth and Perry, 71 Calif. L. Rev. 146, 176 (1983), citing Pennoyer v. Neff, 95 U.S. 714 (1878).

Fortunately this Court has consistently held that procedural provisions of state statutes do not govern whether an individual has a protected liberty or property interest or what procedural safeguards are necessary to protect that interest. See, e.g., Kentucky v. Stincer, 433 U.S. 745, 755 (1982); id. at 775 (Rehnquist, J.,

dissenting); Vitek v. Jones, 445 U.S. 480, 490-491 & n.6 (1980); Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell & Blackmun, J.J., concurring); id. at 185 (White, J., concurring in part and dissenting in part); id. at 211 (Marshall, Douglas & Brennan, J.J., dissenting). This clearly established principle has been stated most recently and forcefully in Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982):

> Each of our due process cases has recognized, either explicitly or implicitly, that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." Vitek v. Jones, 445 U.S. 480, 491 (1980). . . . Indeed, any other conclusion would allow the State to destroy at will

virtually any state-created property interest. The Court has considered and rejected such an approach: "While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." Vitek v. Jones, 445 U.S., at 490-491, n.6, quoting Arnett v. Kennedy, 416 U.S., at 167 (opinion concurring in part). (Brackets in original).

As a matter of simple justice and fundamental constitutional principle Ohio must not be permitted to condition its statutory grant of a protected property interest in classified civil service employment upon constitutionally inadequate statutory procedural provisions.

II. DELAY OF MORE THAN NINE (9) MONTHS BEFORE A CLASSIFIED CIVIL SERVICE EMPLOYEE IS GRANTED A DECISION ON HIS POST-TERMINATION ADMINISTRATIVE APPEAL VIOLATES THE DUE PROCESS CLAUSE.

The fundamental requirement of due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U.S. 385, 394 (1908). If the opportunity to be heard is to have any significant import, it must be granted "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

When the state deprives an individual of a property interest the length of wrongful deprivation is an important factor in assessing the impact of the official action on the private interest. Fusari v. Steinberg, 419 U.S. 379, 389 (1975). Furthermore, the rapidity of administrative review is a significant

factor in assessing the sufficiency of the entire process. Id. See also Gerstein v. Pugh, 420 U.S. 103 (1975).

Consequently, when a property interest is implicated, this court has declared particular administrative processes constitutionally adequate or inadequate contingent on the availability of a prompt hearing and prompt administrative disposition. Barry v. Barchi, 443 U.S. 55 (1979); Mackey v. Montrym, 443 U.S. 1 (1979); Gibson v. Berryhill, 411 U.S. 564, 575 n.14 (1973).

Similarly this court has considered the adequacy and availability of pre-deprivation procedures in assessing the impact of delay in post-deprivation hearing and review. Where pre-deprivation procedure is meager, post-deprivation delay has been found

constitutionally intolerable. Cf. Goss v. Lopez, 419 U.S. 565 (1975).

The nine-month delay under consideration here differs drastically from the three-month delay tacitly approved in Arnett v. Kennedy, 416 U.S. 134 (1974), because of the obvious temporal disparity, and the conspicuous absence of any meaningful pre-termination procedural safeguards in the instant case. See id. at 137.

The administrative torpor under which a discharged public employee labors in Ohio is most acutely demonstrated through a chronicle of cross-petitioner Loudermill's experience. Loudermill was discharged by letter on November 3, 1980. He filed his request for a full hearing on November 12, 1980. On August 10, 1981, the Civil Service Commission

finally affirmed Loudermill's discharge after protracted administrative proceedings.

Amicus contends that a nine-month delay between discharge and the administrative resolution of that action is per se unreasonable and violative of the discharged employee's right to due process. A hearing clearly loses its capacity to be meaningful to the employee after such a prolonged delay and, instead, imposes an irreparable injury upon the discharged employee.

The public employee's interest in continued employment is a substantial one. Logan v. Zimmerman, 455 U.S. 422, 434 (1982). Once deprived of that employment, the discharged public employee, not unlike the license suspendee, has a significant interest in the

prompt disposition of the State's claims against him. See Barry v. Barchi 443 U.S. 55, 66 (1979). That the discharged public employee may seek other employment during that interim is at best a tenuous proposition. "The employee may not be able to secure a satisfactory position in the private sector, particularly a tenured one, and his marketability may be under a cloud due to the circumstances of his dismissal." Arnett v. Kennedy, 416 U.S. 123, 194 (1974) (White, concurring and dissenting). See also id. at 219 (Marshall dissenting).

Moreover, an Ohio public employee who is discharged for cause is precluded from seeking unemployment compensation. Ohio Revised Code § 4141.29(D); see also Christian v. New York State Department

of Labor, 414 U.S. 614 (1974). Similarly, the discharged government employee may be barred from collecting welfare benefits absent his willingness to liquidate significant personal possessions, including his home and car. Ohio Administrative Code §§ 5101:1-3-05, -06.

It is obvious that the longer the period between the discharge and the hearing the more devastating will be the impact of the loss of employment. A weekly paycheck may be the only thing that stands between the discharged employee and the forfeiture or repossession of his home, car and other possessions. Cf. Fuentes v. Shevin, 407 U.S. 67 (1972); Fusari v. Steinberg, 419 U.S. 379 (1975).

Therefore the notion that a wrongfully discharged employee may be made whole by eventual reinstatement and back pay, where that employee has been deprived of his regular income in excess of nine months, misperceives the full injury inherent in such a delay. Indeed the public employee may suffer virtually the full impact of the injury occasioned by the delay before he may contest his termination. See Barry v. Barchi, 433 U.S. 55, 66 (1979). See also Comment, Fear of Firing: Arnett v. Kennedy and the Protection of Federal Career Employees: 10 Harv. Civil Rights-Civil Lib. L. Rev. 472, 479.

The lower court observed that the employee could have, but did not, institute a mandamus action. Loudermill v. Cleveland Civil Service

Commission, 721 F.2d 550, 564 (1983). Amicus maintains that mandamus, while theoretically available, State ex. rel. Heslin v. Colling, 9 Ohio St.3d 117 (1984), is an inadequate remedy for the discharged employee who awaits administrative review. Since mandamus is not available to enforce discretionary duties, Cf. Heckler v. Ringer, 52 U.S.L.W. 4347 (1984), mandamus would not be available to remedy the delay presented in this case, absent a court holding that such a delay violated the employee's due process rights. But in Ohio the statutory requirement that a hearing be held within thirty days, Ohio Rev. Code Ann. § 124.34 (Page 1978) has been held to be merely a guideline and not mandatory. In re Bronker, 53 Ohio Misc. 13, 372 N.E.2d 1345 (1977).

In addition, the government's fiscal and operational interests would be best served by providing the discharged employee with a prompt post-termination hearing. Indeed, Ohio Rev. Code Ann. § 124.34 (Page 1978) constitutes the State legislature's own recognition of this fact by virtue of its specification that such a post-termination hearing be held within thirty days following discharge.

When the government employer discharges an employee, it must necessarily hire and train another individual to fill the vacancy left by the terminated employee.

The effect of any appreciable delay is two-fold where the discharged employee ultimately wins reinstatement. During the pendency of the appeal the replace-

ment employee may have acquired tenured status, and the State is liable for a back pay award to the wrongfully discharged employee as well as being liable for the wages of the replacement employee.

The longer the delay between discharge and hearing, the more expense will be incurred by the State in providing the hearing itself. All legal proceedings are expensive and the more protracted such proceedings become and the higher the stakes rise the more costs will be incurred by the State in prosecuting the case and providing the forum. Cf. Santosky v. Kramer, 455 U.S. 745, 763 (1982). The State cannot in good faith assert any counterbalancing savings arising from abandoned claims by discharged employees since it is clear

that the government has no legitimate interest in using delay as an instrument of economic duress.

Substantial delay in the provision of a post-termination hearing imposes significant and unnecessary costs, both financial and other, upon the discharged employee and the government. These costs far outweigh any illusory benefit thought to be gained.

Indeed, as this court concluded in Barry v. Barchi, 443 U.S. 55, 66 (1979):

> We also discern little or no state interest, and the State has suggested none, in an appreciable delay in going forward with a full hearing. On the contrary, it would seem as much in the State's interest as Barchi's to have an early and reliable determination with respect to the integrity of [its initial termination decision].

CONCLUSION

Therefore, amicus respectfully requests this court to affirm the pre-termination procedures that the lower court found mandated by the due process clause. In a time of ever worsening individual alienation, and of an increasingly large, bureaucratic, and impersonal government, it is necessary to impose a constitutional mandate of civility, courtesy, and even humanity upon institutions not rewarded for such characteristics.

Imposing such a requirement would cost nothing--it would simply make the administrator talk to an individual before taking action affecting him.

Additionally, amicus respectfully requests this court to reverse the lower

court and find that the substantial delay presented in this case was unreasonable, and violated the discharged employee's due process rights. In this case, justice delayed was indeed justice denied.

Respectfully submitted,

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution states, in pertinent part, as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of the law. . . ."

2. Ohio Administrative Code § 5101:1-5-05 states, as follows:

> 5101:1-5-05 Personal property requirement for GR
>
> (A) The value of nonexempt personal property for general relief applicants/recipients is subject to certain maximum limitations.
>
> (1) The total value of all nonexempt personal property may not exceed two thousand two hundred fifty dollars for the individual or the assistance group.
>
> (2) In addition to the ceiling of two thousand two hundred fifty dollars on the total value of all

> types of nonexempt personal property, there are sublimits on liquid assets, life insurance, motor vehicles, and farm and business machinery.
>
> (a) The individual/family may retain cash or other negotiable items convertible to cash (stocks, bonds, trust deeds) up to a total value of three hundred dollars. The limit applies to the total family included in the assistance group, not to the individual member of the family.
>
> (b) Life insurance whose total cash surrender value is no more than five hundred dollars may be retained by each individual whose needs are included in the assistance grant. The cash surrender value of all policies in the assistance group combined with all other personal property cannot exceed two thousand two hundred fifty dollars.
>
> (c) Any number of motor vehicles may be retained provided the total net value of all vehicles does not exceed one thousand two hundred dollars. Motor vehicles include auto-

mobiles, trucks, campers, vans, motorcycles, trailers, boats, snowmobiles, and motorboats.

3. Ohio Administrative Code § 5101:1-5-06 states, as follows:

5101:1-5-06 Real property requirement

A person may retain land and improvements (e.g., buildings) as long as it is being used to provide support for that person and provided the person has the right to possess, use, control or dispose of that property. Real property may be utilized in one of three ways:

(A) May be used as the person's home provided that:

(1) Value as determined by the county auditor as the market value minus encumbrances or liens does not exceed $12,000.

(2) The person's home is defined as the house used by the applicant/recipient and his spouse and the land adjoining which is not readily separable from the house.

(B) May be used to produce income for the support of the person provided:

(1) Annual net income produced equals at least six percent (6%) of the market value as determined by the county auditor; and

(2) Monthly net income produced is used for the support of the person.

(C) Must be sold and the proceeds used for the support of the person. This requirement will be considered met if the property is:

(1) Listed for sale at a value not less than the value determined by the county auditor as the market value, and

(2) No offer is refused that is at least 90% of the value determined by the county auditor as the market value.

4. Ohio Rev. Code Ann. § 124.34 states, in pertinent part, as follows:

Tenure of office; reduction, suspension, and removal; appeal

The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services, or the commission, or any other acts of misfeasance, malfeasance, or nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute a

violation of Chapter 102 of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal.

In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.

Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to

hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm disaffirm, or modify the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.

5. Ohio Rev. Code Ann. § 4141.29 states, in pertinent part, as follows:

> (D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:
>
> (1) For any week with respect to which the administrator finds that:
>
> (b) He has been given a disciplinary layoff for misconduct in connection with his work.

> (2) For the duration of his unemployment if the administrator finds that:
>
> (a) He quit his work without just cause or has been discharged for just cause in connection with his work.

AMICUS CURIAE

BRIEF

Office - Supreme Court, U.S.
FILED
AUG 20 1984
CLERK

Nos. 83-1362, 83-1363

Supreme Court of the United States

OCTOBER TERM, 1983

CLEVELAND BOARD OF EDUCATION,
Petitioner,
v.
JAMES LOUDERMILL,
Respondent.

PARMA BOARD OF EDUCATION,
Petitioner,
v.
RICHARD DONNELLY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether the Respondent government employers violated the Due Process Clause by summarily terminating the employment of two classified civil service employees without a pretermination evidentiary hearing where there were neither extraordinary circumstances, nor a reliable pretermination procedure for the determination of "cause," nor an overriding state interest in summary removal?

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---

BRIEF FOR THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE*

The American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO, is a labor organization representing over a million men and women employed by state, county and municipal governments and school districts throughout the United States. As the collective bargaining representative of public employees, AFSCME has a special interest in the procedures to be

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*Statements of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

afforded to public employees by their employers prior to the termination of their employment. AFSCME submits this brief in support of Respondents James Loudermill and Richard Donnelly. AFSCME argues in this brief that in light of the test announced by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and on the facts of this case, Respondents Loudermill and Donnelly were entitled to a full evidentiary hearing prior to the termination of their employment as a matter of constitutional law.

STATEMENT OF THE CASE

At issue in this consolidated appeal are the claims of two classified civil service employees that their right to due process of law, as guaranteed by the 14th Amendment to the United States Constitution, was violated as a result of, *inter alia*, the summary termination of their employment by their public employers. The facts underlying the due process claims of Richard Donnelly and James Loudermill are set forth in the decision of the U.S. Court of Appeals reported in *Loudermill v. Cleveland Board of Education*, 721 F.2d 550 (6th Cir. 1983). None of the material facts underlying the Petitioners' claims are in dispute. These facts can be summarized as follows:

In 1979 James Loudermill was employed as a security guard in the Cleveland Public Schools by a private security firm under contract with the Cleveland City School District. Mr. Loudermill's private employer filed for bankruptcy in 1979 and, as a result, Mr. Loudermill applied for a position as a security guard directly with the school district. On his written application for employment with the Cleveland Board of Education Mr. Loudermill was asked "Have you ever been convicted of a crime (felony)?" Mr. Loudermill replied "No." The application concludes with the statement, "I certify that all the statements made by me in this application are true, complete and correct to the best of my knowledge . . ."

Mr. Loudermill's application for employment was accepted by the Cleveland Board of Education on or about September 25, 1979. On September 1, 1980, Mr. Loudermill was transferred to a newly created Department of Safety and Security within the Cleveland Board of Education. Pursuant to this reorganization, a routine examination was performed of Mr. Loudermill's employment records. This examination revealed that Mr. Loudermill was convicted of a felony in 1968. On November 3, 1980, Mr. Loudermill was informed, by letter from the business manager of the Cleveland Board of Education, that he had been dismissed from his job on the ground of dishonesty for lying on his employment application.

The Board of Education did not base its decision to terminate Mr. Loudermill on any conduct relating to the actual performance of his job. The record is devoid of any allegation that Mr. Loudermill was an unacceptable employee during his tenure as a school security guard with his private or public employer. Moreover, there is no indication that the alleged act of "dishonesty" affected his job performance, the discipline or morale of his fellow employees, or the safety or security of the school children under the jurisdiction of the Cleveland Board of Education. The sole charge that served as the basis for Mr. Loudermill's discharge concerns his representation on his employment application that to the best of his knowledge he had never been convicted of a felony.

Richard Donnelly was hired as a bus mechanic by the Parma Board of Education. The record does not indicate how long Mr. Donnelly was so employed. On August 17, 1977, Mr. Donnelly was discharged by his employer because of his failure to pass an eye examination. The record contains no evidence that any deficiency in Mr. Donnelly's eyesight had any impact on his job performance. Similarly, there is no indication that his eyesight posed an immediate threat to the safety of Mr. Donnelly,

his fellow employees or the general public or that Mr. Donnelly could not have been transferred to other duties pending a hearing. The sole justification for Mr. Donnelly's termination was his failure to pass an eye examination.

Both Messrs. Loudermill and Donnelly were classified employees under the Ohio Civil Service law. Section 124.34 of the Ohio Rev. Code Ann. provides, *inter alia*, that: "the tenure of every officer or employee in the classified service . . . shall be during good behavior and efficient service." Both Messrs. Loudermill and Donnelly were denied a hearing of any kind prior to their termination.

The record indicates that if Mr. Loudermill had been given a pretermination hearing, "he would have asserted that he was not dishonest when he completed his employment application form because at that time he thought that he had only been convicted of a misdemeanor and not a felony." *Loudermill v. Cleveland Board of Education*, District Court Memorandum Opinion, A47, n.7. The record indicates that if Mr. Donnelly had been afforded a pretermination hearing, he would have informed the Board that it continued to employ another bus mechanic who had failed the eye examination. In addition, Donnelly would have challenged the presumption that failure to pass the eye examination constituted cause for the discharge of a bus mechanic. 721 F.2d at 554.

Three separate due process claims are advanced by the two public employees in these consolidated actions. Both Loudermill and Donnelly allege that they were deprived of property without due process because they were not permitted to respond to the charges against them prior to their terminations. In addition, they allege that they were denied due process by the unreasonable delay preceding their post-termination evidentiary hearings. Finally, Loudermill and Donnelly allege that the failure to

afford them an opportunity to be heard prior to termination violated their "liberty" interests.

The District Court dismissed both cases for failure to state a claim under the United States Constitution. The Court of Appeals sustained Loudermill's and Donnelly's claim that they were deprived of property without due process by these terminations without any prior opportunity to be heard, holding that "appellees' failure to afford Loudermill and Donnelly an opportunity to present evidence challenging the proposed discharges violated the Fourteenth Amendment," 721 F.2d at 563. The Court of Appeals, however, rejected Loudermill's and Donnelly's claims based on the delay preceding their post-termination hearings, 721 F.2d at 564, and the violation of their liberty interests, 721 F.2d at 563 n.18.

In its decision, the Court of Appeals recognized that Loudermill and Donnelly were not arguing for a "full fledged evidentiary hearing, but rather for an opportunity to present their side of the case, whether in person or by letter," 721 F.2d at 560. The Court of Appeals sustained the employees' claim, holding that the right to question the basis for termination prior to discharge was an essential requirement of due process. However, the Court did not address the issue of what process was due on the facts of this case. AFSCME agrees with the persuasive arguments advanced in this appeal by the American Civil Liberties Union of Cleveland in its Amicus Curiae Brief that the right of a tenured public employee to respond verbally or in writing to charges prior to termination is an irreducible requirement of due process not subject to the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 314 (1976). However, AFSCME respectfully submits that after balancing the competing interests identified in *Mathews*, *id.*, in the context of this case, the due process clause requires that these tenured public employees be afforded a full eviden-

tiary hearing prior to the termination of their employment.[1]

ARGUMENT

1. IN DETERMINING WHAT PROCESS IS DUE AN INDIVIDUAL PRIOR TO THE DEPRIVATION OF PROPERTY BY THE STATE, THE COURT MUST BALANCE THE COMPETING INTERESTS OF THE INDIVIDUAL AND THE STATE ON THE FACTS OF THE PARTICULAR CASE.

What Justice Jackson observed almost 35 years ago remains true today. In writing for the Court in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), Justice Jackson stated:

> Many controveries have raged about the cryptic and abstract words of the due process clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Id. at 313. In addressing the application of due process in an employment context, this Court held that "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). More recently, this Court has recognized that "'[d]ue process is flexible and calls for such procedural protections as the particular situation demands.' *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Mathews v. Eldridge*, 424 U.S. 319 (1976)," quoted in *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 14 n.15 (1978). This Court has acknowledged that "'the timing and nature of the required hearing' will depend on appropriate accommodation of the competing interests

[1] By "full evidentiary hearing" AFSCME is referring to those procedural protections that this Court found were required by due process in its decision in *Goldberg v. Kelly*, 397 U.S. 254, 266-271 (1970).

involved," *Goss v. Lopez*, 419 U.S. 565, 579 (1975), quoted in *Logan v. Zimmerman Brush Co.*, 445 U.S. 422, 102 S.Ct. 1148, 1157 (1982).

In making this balanced determination, however, the Court cannot depart from the fundamental principle that "except in emergency situations . . . due process requires that when a state seeks to terminate an [important property] interest . . . it must afford 'notice and opportunity for hearing . . .' *before* the termination becomes effective." *Bell v. Burson*, 402 U.S. 535, 542 (1971) (emphasis in original). *See also Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971) (hearing must precede deprivation "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event"). The decisions of this Court interpreting the requirements of the Due Process Clause clearly hold that the determination of the procedural safeguards to be afforded an individual prior to the deprivation of a property interest by the state depends upon a balancing of competing interests in light of the specific facts of an individual case. In this light, the procedures found to be adequate under the Due Process Clause in one case may be constitutionally inadequate in another.

In *Arnett v. Kennedy*, 416 U.S. 134 (1974), this Court addressed for the first time the issue of the process to which a tenured federal employee was entitled prior to his termination from employment. The employee in *Arnett*, *id.*, was charged with making libelous statements regarding his supervisor and his administration of the agency. No opinion in *Arnett*, *id.*, was able to command a majority of the Court. In an opinion joined by two members of the Court, Justice Rehnquist did not address the procedural requirements of the Due Process Clause because he held that the statute granting Kennedy his property interest in federal employment also defined the procedures by which that interest could be denied, 416

U.S. at 152-154.[9] The other members of the court addressed the issue of whether Kennedy was entitled, under the Due Process clause, to a pretermination evidentiary hearing. Justices Marshall, Brennan and Douglas explicitly held that Kennedy was entitled, as a matter of constitutional law, to a pretermination evidentiary hearing. 416 U.S. at 206. Justice White, writing separately, also supported the requirement of a pretermination evidentiary hearing. 416 U.S. at 171. Justice Powell, joined by Justice Blackmun, held that Kennedy was not entitled to a pretermination evidentiary hearing under the particular facts of his case, 416 U.S. at 164. Given the deep division within the Court on this issue, *Arnett* does not constitute a definitive statement regarding the times when or the situations in which a pretermination evidentiary hearing is constitutionally required. Justice Powell's opinion is significant, however, in that it articulates an approach to the consideration of due process claims that was adopted by the Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976).[8]

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[9] Petitioner Parma Board of Education relies upon the opinion of Justice Rehnquist in *Arnett v. Kennedy*, id., for the proposition that a tenured state employee's property interest is conditioned by the procedures contained in the statute conferring the interest. As this Court stated in *Logan v. Zimmerman Brush Co.*, 445 U.S. 422, 102 S.Ct. 1148, 1155 (1982), "[t]he court has considered and rejected such an approach." See also, *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (the minimum requirements of due process are a matter of federal law).

[8] The Court in *Mathews v. Eldridge*, supra, at 335 articulated the following test for the consideration of due process claims:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Justice Powell based his holding on a detailed analysis of the competing interests of Kennedy and his public employer and on an analysis of the pretermination procedures actually afforded Kennedy. Powell concluded that the question of whether a public employee was entitled to a pretermination evidentiary hearing depended upon the outcome of a balancing process weighing the interests of the employee in continued employment and the interest of the state in summary removal. *Id.* at 167-168. In addition, Powell considered whether the pretermination procedures actually provided to Kennedy were effective in minimizing the "risk of error in the initial removal decision." *Id.* at 170. Applying these factors to the specific facts of the case, Justice Powell concluded that an evidentiary hearing prior to termination was not constitutionally required. *Id.* at 171.

AFSCME respectfully submits that the facts considered by Justice Powell in his determination that the Due Process Clause did not require that Kennedy be afforded an evidentiary hearing prior to his termination are dramatically different from the facts of the instant consolidated cases. Kennedy was charged with misconduct arising out of certain statements he made about his superior and the operation of his office. Kennedy's libelous statements clearly affected the continued operation of the office and Kennedy's relationship with his superiors and fellow employees. In contrast, in the instant cases there has been no showing that Loudermill's and Donnelly's continued employment pending a full hearing would adversely affect the operation of the school districts in which they were employed. In *Arnett v. Kennedy*, id., the public employee was afforded a wide range of procedural safeguards prior to termination which, in Justice Powell's view, minimized the possibility of an incorrect determination of cause for discharge. The pretermination procedures available to Kennedy are a far cry from the summary discharges at issue in this appeal. In fact,

the right to respond to charges, either verbally or in writing, prior to termination, which the Court of Appeals found was a fundamental requirement of due process (a finding which is the gravamen of the employers' appeal to this court), is substantially less process than was afforded to Kennedy under the Lloyd-LaFollette Act, 5 U.S.C. § 7501, and the regulations promulgated pursuant to that Act.

II. THE INTEREST OF THE ACCUSED EMPLOYEE IN CONTINUING HIS EMPLOYMENT PENDING AN EVIDENTIARY HEARING ON THE CHARGES BROUGHT AGAINST HIM IS SUBSTANTIAL.

In their briefs to this Court, both the Cleveland and Parma Boards of Education attempt to minimize the interests of public employees in retaining their jobs pending an evidentiary hearing. In its brief, the Cleveland Board of Education argues:

> While the degree of harm varied in these cases [*Bell v. Burson*, 402 U.S. 535 (1971); *Goss v. Lopez*, 419 U.S. 565 (1975); *Vitek v. Jones*, 445 U.S. 480 (1980)], they were analogous in the permanence of the deprivation. Regardless of how soon a hearing would have been held after the deprivation in the above cases, the individuals would have forever lost the time spent without a license, education in the classroom, and the time incarcerated in a mental facility.
>
> Respondent Loudermill, in contrast, would temporarily have been without wages and benefits. These could have been retroactively computed had a post-termination hearing later determined that his termination was invalid. The harm caused Respondent by his termination would not be of the permanent nature of that in *Bell*, *Goss* and *Vitek*.

Cleveland Brief at pp. 8-9. The Parma Board of Education similarly identifies the interests of the employee as the "avoidance of delay in the receipt of income from

public employment." Parma Brief at p. 14. Parma also argues that because of the availability of a backpay remedy, the public employee is never deprived of a property interest until after the post-termination hearing. Parma Brief at p. 15. Petitioners argue that the interest of public employees in retaining their positions pending a hearing is minimized by the availability of interim employment in the private sector and, if necessary, welfare payments.

The Petitioners' analysis of the interest of a public employee in continued employment pending an evidentiary hearing is flawed in two key respects. First, the Petitioners underestimate the economic impact of termination of employment pending a hearing by exaggerating the economic resources available to the employee and his family. Their projections regarding economic resources within the family as well as the availability and/or adequacy of interim employment in the private sector are without foundation.

As stated by Judge Skelton in his concurring opinion in *Ricucci v. U.S.*, 425 F.2d 1252, 192 Ct. Cl. 1 (1970):

> Few [government employees] earn more than enough to pay their living expenses from month to month, and when their salaries are cut off they may be in the same destitute circumstances as a welfare recipient whose aid has been discontinued.

425 F.2d at 1257. In an analogous context, this Court has observed in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), that denying an individual his wages could "as a practical matter drive a wage-earning family to the wall." 395 U.S. at 341-342 (footnote omitted). *See also Bell v. Burson*, 402 U.S. 535 (1971) (revoking a driver's license effectively denying a person a means to earn a livelihood).

In minimizing the impact on public employees of termination pending an evidentiary hearing, the Petitioners

state that the employee can secure interim private employment. See Parma Brief at p. 15. However, the prospect of interim private employment is highly speculative and on the facts of the instant case may be illusory. Interim employment may not be available to either Loudermill or Donnelly because employers may be unwilling to hire and train an employee who may return to public employment at any time. Furthermore, due to the circumstances of his dismissal, Loudermill may be unable to locate an employer who is willing to hire a convicted felon and an accused liar on an interim basis. The cloud on Loudermill's reputation resulting from his employer's allegations not only affects his liberty interest, but also limits the availability of other employment pending his opportunity to rebut his employer's allegations. *See Lefkowitz v. Turley*, 414 U.S. 70, 83-84 (1973).

The second major flaw in the Petitioners' analysis is their assumption that the only interest that an employee has in his or her job is the receipt of a wage. Since this wage can be partially replaced by welfare payments or other wages, or can be retroactively paid in a backpay award, the Petitioners argue that the employee's interest in his job is minimal. This profoundly cynical view of the relationship between a worker and his work assumes that a job has no value to an employee beyond a wage. Petitioner Boards argue that work is no different than welfare. This assumption is simply untrue. An employee has an interest in the continuation of the opportunity to perform meaningful and fulfilling work. *Cf. Arnett v. Kennedy*, 416 U.S. at 212 (Marshall, J., dissenting) ("Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life").

The Petitioners assume that the wrongfully terminated employee can be made whole through the award of backpay. This Court has never "embraced the general proposition that a wrong may be done if it can be undone." *Stanley v. Illinois*, 405 U.S. 645, 647 (1972). However,

even if it had, it is clear in this situation that the simple award of backpay is inadequate to make the employee whole for the loss of his work. Moreover, the award of money at some future date will not cure harms to the worker, his family, or their community produced by joblessness.

The Court of Appeals in its decision in this case recognized that "[e]mployment provides not only financial livelihood, but frequently self-esteem and social status." 721 F.2d at 561. This self-esteem and social status is a direct byproduct of the individual's participation in the social activity called work. Work has an inherent value to the worker because it is an opportunity to cooperate with others in a socially productive activity. Work not only affords the worker the status of being "employed"; it also contributes to a sense of usefulness and belonging. When work is involuntarily withdrawn, the worker often experiences feelings of worthlessness and isolation. It is the loss of the opportunity to work itself that cannot be restored through the award of backpay and will be forever denied the public employee as a result of his/her termination.

A number of recent studies have documented not only the destruction of self-esteem and social status resulting from unemployment, but the threat to the health of the unemployed worker and his/her family resulting from joblessness. In his introduction to a Congressional study on this subject, Committee Vice Chairman Congressman Lee H. Hamilton stated:

> From these studies, unemployment contributes strongly to such negative outcomes as higher suicide rates and mortality due to cardiovascular disease; higher rates of mental hospital admissions and imprisonments; hypertension resulting in subsequent illness; depression, anxiety, aggression, insomnia, and marital problems. Periods of high unemployment, with slow re-employment of jobless individuals, take their toll on not only the unemployed but

> their families and communities, as well as on those whose jobs are made more stressful by extra responsibilities or fears of lay off.

JOINT ECONOMIC COMMITTEE, SUBCOMMITTEE ON ECONOMIC GOALS AND INTERGOVERNMENTAL POLICY, 98TH CONG., 2d SESS., REPORT ON ECONOMIC CHANGE, PHYSICAL ILLNESS, MENTAL ILLNESS, AND SOCIAL DEVIANCE, p. III (Senate Print 1984).

Supplementing these studies on the effect of unemployment are recent Congressional hearings on the health effects of unemployment on workers and their families. Dr. Lewis Margolis of the Health Services Resource Center of the University of North Carolina testified that unemployment produced a number of changes within the family, affecting its health and well-being. In addition to the reduced access to necessities such as food, clothing, shelter and preventive medical care that are associated with reduced income, unemployment has other side effects. Dr. Lewis was particularly concerned about the effects of unemployment on children. Dr. Lewis testified that these effects included decline in the child's own self-image and personal status; increased vulnerability to childhood illness related to stress; and an increase in the incidence of battering at the hands of frustrated and embittered parents. *Impact of Unemployment on Children and Families: Hearings before the Subcommittee on Labor Standards of the Committee on Education and Labor of the U.S. House of Representatives*, 98th Cong., 1st Sess. 48-56 (1984). Congressman Miller, Chairman of the House Subcommittee on Labor Standards, stated the problem in the following terms:

> Victims of unemployment have lost far more than their jobs. Millions of jobless Americans have lost their financial security, their health, their families—and even their lives—as a result of unemployment. . . .
>
> Children become the special victims of their parents' unemployment. Serious declines in school performance, increases in malnutrition, child abuse and domestic violence, and a worsening of parent-child relationships are all testimony to the real costs paid by unemployed families.

Id. at pp. 1-2. Other testimony during the Congressional hearings indicates that the spouses of unemployed workers are subject to increased stress and are more likely than those in the population as a whole to suffer the effects of domestic violence. See Statement of Barbara Shaw, Executive Director, Illinois Coalition Against Domestic Violence, *id.* at pp. 30-32.

The Petitioners have clearly understated the interest of public employees in continued employment. The Petitioners have advanced arguments regarding the availability of interim private employment and the resources available to unemployed public employees that are unsupported by fact. In addition, they have failed to consider the problems faced by displaced public employees in their attempt to secure interim private employment. These problems include, *inter alia*, the reluctance of private employers to hire workers whose competence and/or reputation may be under a cloud and who may leave with little or no notice to return to their public sector jobs. But perhaps most fatal to Petitioners' consideration of the interest of discharged public employees is their premise that the only injury to the employee is a temporary interruption of income. As the Court of Appeals recognized, and the studies and testimony cited above demonstrate, the injury to an unemployed worker and his/her family cannot be measured in dollars alone. Moreover, an award of backpay at some point in the indefinite future will not compensate the employee for "the real costs" paid by that employee and his/her family. AFSCME respectfully submits that it is this "real cost" of unemployment that must be put on the scale with the state's interest in utilizing summary procedures to terminate its employees.

III. A SUMMARY PROCEDURE WILL OFTEN RESULT IN AN ERRONEOUS DEPRIVATION OF A PROTECTED PROPERTY INTEREST.

The second factor which must be considered in deciding what process is due prior to termination "is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards," *Mathews*, 424 U.S. at 343, or the "likelihood of governmental error." *Logan* at 1157.

"Central to the evaluation of any administrative process is the nature of the relevant inquiry." *Mathews*, 424 U.S. at 343. The vast majority of civil service statutes and regulations, personnel policies, and individual employment contracts governing discharge of public employees provide that such employees may only be discharged for "cause" or for "just cause" or "good cause." Cause has been defined to mean conduct rendering an employee unfit to hold office. *See, e.g., Bishop v. Wood*, 426 U.S. 341, 355 (1976) (White, J., dissenting) ("cause—i.e., failure to perform up to standard, negligence, inefficiency, or unfitness to perform the job"). The civil service law governing discharge of both Loudermill and Donnelly provided:

> [N]o such officer or employee shall be . . . removed . . . except for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

Ohio Rev. Code Ann. § 124.34.

The inquiry into whether cause for removal exists involves two separate factual investigations: (1) into the employee's conduct and (2) into the relationship between the conduct and the employee's performance of his or her

office. A similar two-part inquiry is necessary in parole revocation proceedings. This Court has recognized

> that the hearing required by the Due Process Clause in order to revoke parole must address two separate considerations. The first is whether the parolee in fact committed the violation with which he is charged, and the second is whether if he did commit the act his parole should, under all the circumstances, therefore be revoked. *Morrissey v. Brewer*, 408 U.S. 471, 479-480, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 784, 36 L. Ed. 2d 656, 93 S. Ct. 1756, 71 Ohio Ops. 2d 279 (1973).

Codd v. Velger, 429 U.S. 624, 627 (1977).

Both parts of this inquiry are essential to a finding of cause. There may be no dispute concerning whether a particular act is cause for discharge, but the factual finding that the employee committed the act is obviously a necessary predicate of removal. In Loudermill's case, Ohio law specifically enumerates "dishonesty" as cause for discharge. Ohio Rev. Stat. Ann. § 124.34. However, it is a factual question whether Loudermill acted dishonestly in answering the question on his application form or simply erred because he did not know the precise definition of a felony.

Conversely, even if there is no dispute concerning the employee's conduct, there remains the factual question of whether the conduct constitutes cause. In the context of parole revocation:

> The fact that there [is] no dispute with respect to the commission of the act would not necessarily obviate the need for a hearing on the issue of whether the commission of the act warranted the revocation of parole.

Id.

In Donnelly's case, Petitioner Parma Board of Education argues that there is no dispute concerning Donnelly's

failure to pass the eye examination. Even assuming that there was no dispute concerning the deficiency of Donnelly's eyesight,[4] there remains a factual question of whether the deficiency has affected or will in any manner affect adversely Donnelly's performance. Evaluation of this question requires finding of facts concerning the precise requirements of the job, the nature of the deficiency in Donnelly's eyesight, and the relationship between the deficiency and the job requirements. Donnelly's contention that other mechanics failed the test, but were not terminated, is relevant to this second factual inquiry.

Neither of these essential inquiries is sharply focused or easily documented. Both require evaluation of a variety of forms of evidence, often including testimony. Conflicting stories will often be told. "Particularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision." *Goldberg* at 269. *Cf. Mathews* at 343-44. In the similar context of school discipline, this Court found:

> Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against.

Goss v. Lopez, 419 U.S. 565, 580 (1975).

The finding of cause, in most instances, involves a finding of fault. This Court has found:

> [A] "'broad fault' standard is inherently subject to factual determination and adversarial input." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 617 (1974).

Califano v. Yamasaki, 442 U.S. 682, 696 (1979).

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[4] Donnelly might, of course, have contested the use of a single piece of evidence—the test results—to conclude that his eyesight was in any manner deficient.

Both inquiries necessary for a finding of cause are also highly particular, necessitating evaluation of unique conduct and job duties and requirements. By contrast, this Court stated in *Mathews* that "the decision whether to discontinue disability benefits will turn, in most cases, upon 'routine, standard, and unbiased medical reports by physician specialists'." *Id.* at 319.

The party with the greatest knowledge of an employee's conduct and its relation to his or her function will be the employee. Not providing the employee an opportunity to be heard prior to termination vastly increases the probability of erroneous terminations.

Furthermore, the initial decision-maker in the context of public employment will not be a neutral and detached arbiter. The decision will often be made by the employee's immediate supervisor or the head of the employee's office. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), a teacher was dismissed after he criticized a board of education. This Court noted that the board had been not only the "trier of fact," but also "the victim of appellant's statements and the prosecutor that brought the charges aimed at securing his dismissal." Although this Court did not reach appellant's claim that this procedure deprived him of due process, it wrote, "On the other hand, we do not blind ourselves to the obvious defects in the fact-finding process occasioned by the Board's multiple functioning vis-a-vis appellant." *Id.* at 579 n.2. There is a substantial risk of bias, and therefore error, in the termination of public employees.

The initial decision-makers in the public benefits cases, i.e. *Goldberg* and *Mathews*, are specialists in the task of evaluating and determining eligibility—their sole function is to grant, deny, or terminate benefits. In contrast, personnel decisions are often incidental to the principal functions of the supervisors and agency heads to make the initial determinations to terminate public employees. In small cities and within smaller departments, employers

may have little or no experience with the type of investigation and evaluation involved in terminating employees.

Finally, the value of additional pretermination procedures cannot be evaluated without recognizing that the value of these same procedures will be significantly reduced if they are utilized after termination. An employee's ability to pursue available administrative remedies is impaired by termination. Furthermore, as described above, termination of a public employee is ordinarily not an impersonal process. After termination, review of the decision is inescapably influenced by knowledge of actions the public employer has taken in reliance on or response to the termination and knowledge of the potentially disruptive effects of reinstatement. The Third Circuit Court of Appeals recognized:

> [T]here is a substantial difference in the position of the parties once termination has actually occurred. First, the employee, cut off from the payroll, is greatly disadvantaged in his ability to pursue the hearing remedy. He may be forced by the necessity for survival to seek other employment which will foreclose the pursuit of reinstatement. Second, the institution will have made substitute teaching arrangements, thus introducing into the hearing consideration of the interests of other faculty members. This inevitability will increase whatever tendency may already exist for the hearing officials to defer to the administration's decision.

Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31, 38 (3d Cir. 1974). Use of a summary procedure to terminate public employees followed by a post-termination evidentiary hearing will often result in wrongful termination.

IV. THE STATE'S INTEREST IN UTILIZING SUMMARY PROCEDURES TO DISMISS PUBLIC EMPLOYEES IS INSUBSTANTIAL.

The final factor which the Court must consider in determining what process is due prior to termination of a

public employee is the public interest. *Mathews*, 429 U.S. at 347. Under the facts of the two cases now before the Court, the public's interest in utilizing summary procedures to dismiss Donnelly and Loudermill is insubstantial.

Petitioners Cleveland and Parma Boards of Education advance the public employer's interest in terminating potentially dangerous employees. This interest, however, is not threatened by a requirement of a pretermination evidentiary hearing. The Boards are free to discharge the employees if the evidence presented at the hearing supports that action. The relevant question is what is the public's interest in *summary* termination of public employees. *See e.g., Stanley v. Illinois*, 405 U.S. at 652.

No evidence in the record suggests that either Loudermill or Donnelly is an imminent threat to the public safety. *Cf. North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (seizure of food unfit for consumption without hearing); *Ewing v. Mytinger and Casselberry*, 339 U.S. 594 (1950) (seizure of mislabeled articles in commerce). Loudermill was convicted of a felony eleven years before he was hired by the Cleveland School Board. Whether deliberately or by mistake, Loudermill indicated that he had never been convicted of a felony at the time he applied for employment with the Board. Prior to being hired by the Board, Loudermill was employed by a private firm under contract to provide security guards to the Board, and there is no evidence in the record that Loudermill's performance was anything but exemplary. Loudermill performed his job for the Board for over a year and no evidence in the record suggests that his performance was in any manner deficient.

Donnelly was employed as a bus mechanic by the Parma Board. There is no evidence in the record that his performance was impaired in any respect. The Board summarily terminated Donnelly based on his failure to pass an eye examination.

The public employer should not be allowed to simply cite the public interest in safety as grounds for summary dismissal of employees. Petitioner Cleveland Board argues that "the government's interest requires that a Board of Education be allowed to *immediately* remove those individuals who are a danger, *however potential*, to its pupils, teachers, and property." Brief, at p. 10 (emphasis added). This position eliminates the balancing test required by *Mathews* and requires that the government's interest, no matter how speculative, prevail over the interest of the individual employee. Applying the *Mathews* test, the employer must present evidence of conduct by the employee which creates a reasonable inference that the interim retention of the employee would create a danger to the public safety in order to justify summary termination.[9]

No other public interest is threatened by a requirement of an evidentiary hearing prior to dismissal of a public employee. Unlike the situations in *Goldberg* and *Mathews*, public benefits will not potentially be paid to an ineligible recipient during the period preceding the hearing. The public employer will continue to pay the employee in return for valuable services. See *Arnett*, *supra*, at 193-94 (White, J., concurring in part and dissenting in part). Petitioner Boards do not argue that either Loudermill or Donnelly has failed to perform valuable services for the Boards or that there is any evidence that they will not continue to do so. In fact, the public interest will be served by a requirement of an evidentiary hearing prior to dismissal. Administrative costs will be lower than those incurred in a two-step process of less rigorous pretermination procedures followed by a post-termination evidentiary hearing. More importantly, a re-

[9] Even if such evidence existed, the public interest could be fully protected without completely impairing the private right by suspending the employee with pay, *Arnett*, *supra*, at 194 (White, J., concurring in part and dissenting in part), or transferring the employee to a different position, id. at 225 (Marshall, J., dissenting).

quirement of a pretermination evidentiary hearing would eliminate the inefficiencies related to the uncertainty which will otherwise exist during the period between discharge and final hearing. Without a pretermination hearing, the public employer will not know whether it should hire and train a new employee at the risk of having to later dismiss the new hire or bear the cost of an extra employee, or whether it should, in the alternative, attempt to perform its function without a complete staff. There is no public interest in summary termination of Loudermill or Donnelly.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Sixth Circuit on the issue of pretermination due process and further rule that Respondents Loudermill and Donnelly were entitled to a full evidentiary hearing prior to their termination from public employment.

Respectfully submitted,

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RESPONDENT'S

BRIEF

Nos. 81-1606 and 81-1663
Consolidated

FILED

AUG 30 1982

In The

Supreme Court of the United States

October Term, 1982

THE CLEVELAND BOARD OF EDUCATION, et al.
Petitioners
vs.
JAMES LOUDERMILL
Respondent
AND
PARMA BOARD OF EDUCATION
Petitioner
vs.
RICHARD DONNELLY
Respondent

On Writ of CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT RESPONSIVE BRIEF OF THE RESPONDENTS LOUDERMILL AND DONNELLY

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Nos. 83-1362 and 83-1363
Consolidated

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

THE CLEVELAND BOARD OF EDUCATION, et al.
Petitioner
- vs -
JAMES LOUDERMILL
Respondent
AND
PARMA BOARD OF EDUCATION
Petitioner
- vs -
RICHARD DONNELLY
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT

JOINT RESPONSE BRIEF OF THE RESPONDENTS, LOUDERMILL AND DONNELLY

SUMMARY OF ARGUMENT

A majority of the Justices of this Court

held in Arnett v. Kennedy, 416 U.S. 134 (1974), that a full evidentiary hearing was not required prior to the termination of a tenured governmental employee for "cause." However, the plurality Opinion therein, that the constitutionally protected property interest is substantially intertwined with the established statutory procedures to be used in its termination, has been rejected by a majority of this Court since then. Vitek v. Jones, 445 U.S. 480,490-491 n.6 (1980); Logan v. Zimerman Brush Co., et al., 455 U.S. 422, 432 (1982), and Santosky v. Kramer, 455 U.S. 745,755 (1982).

Recently, this Court held in Davis v. Scherer, ___ U.S.___, 52 U.S.L.W. 4956,4958 (1984), that the Due Process requirement, that a tenured public employee be granted some pre-termination procedures, has been established since this Court's decision in Board of Regents v. Roth, 408 U.S. 564,569-570 (1972).

Therefore, the issue in these consolidated cases is not whether any pre-termination procedures are required by the Due Process Clause; but rather, what pre-termination procedures, and the depth thereof, are required.

Some pre-deprivation procedures are required by the Due Process Clause, unless

there is a necessity for quick action or the impracticality of providing a meaningful pre-deprivation proceeding, see Parratt v. Taylor 451 U.S. 527,539 (1981), which is not usually the situation in the termination of a public employee. Further, a short suspension can be used by the employer in the few emergency situations that may occur.

These Joint Respondents state that the applicable procedures of the federal Lloyd-LaFollette Act, as enunciated by this Court in Bush v. Lucas, ___U.S.___, 103 S. Ct. 2404 2415-2416 (1983), be adopted by this Court as the minimum procedures required by the Due Process Clause.

The remainder of the Joint Respondents argument will be specific responses to the Arguments contained in the Briefs of the Petitioners and the amicus curiae Attorney General of the state of Ohio and Nineteen other states.

ARGUMENT

The Joint Respondents Argument will be divided into four parts: A general overview of the law which requires some pretermination procedures, and three responses to the three Briefs filed on behalf of the Petitioners.

GENERAL OVERVIEW

This Court has held that before a person

is finally deprived of a constitutionally protected interest, he is entitled to an opportunity to be heard. Boddie v. Connecticut 401 U.S. 371,379 (1971), and Board of Regents v. Roth, 408 U.S. 564,569-570 (1972).

This Court has also held that some pre-deprivation procedures can be denied only when there is a necessity for quick action, or the impracticality of providing any meaningful pre-deprivation procedures. Parratt v Taylor, 451 U.S. 527,539 (1981).

Additionally, a short suspension could be utilized in emergency situations before a tenured employee is given his due process procedural rights. Therefore, there is no justification for depriving tenured public employees of any pre-termination procedures.

In Thurston v. Dekle, 531 F.2d 1264 (C.A 5th, 1976), the court dealt with a removal statute similar to the Ohio statute, which provided only a post-removal appeal. The court held that although a full evidentiary hearing was not required prior to removal, that certain pre-removal procedures were required based upon Arnett v. Kennedy, 416 U.S. 134 (1974). The court further held that the plaintiffs could not recover their back-pay, because such payments would have to be made from the city treasury, and municipalities

were not "persons" pursuant to the federal civil rights act. This Court granted certiorari and vacated the Court of Appeals judgment for reconsideration, 438 U.S. 901 (1978), solely upon the case of Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), which held that municipalities were "persons" pursuant to said act. The Court of Appeals judgment, therefore, was not vacated because of its holding that the case of Arnett v. Kennedy, supra, required some pre-removal procedures.

The issue in Arnett v. Kennedy was whether a full evidentiary hearing was required prior to termination of a tenured public employee, not whether any pre-termination procedures are required. As this Court recently concluded in Davis v. Scherer, ___US ___, 52 U.S.L.W. 4956,4958 n.10 (1984):

> As the dissent explains at some length, the decisions of this Court by 1978 had required 'some kind of hearing,' Board of Regents v. Roth, 408 U.S. 564,570 n.7 (1972), prior to discharge of an employee who had a constitutionally protected property interest in his employment. But the Court had not determined what kind of a hearing must be provided. Such a determination would require a careful

balancing of the competing interests -of the employee and the State - indicated in the official decision at issue. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976). As the Court has considered circumstances in which no hearing at all had been provided prior to termination, Perry v. Sindermann, 408 U.S. 593 (1972) or in which the requirements of due process were met, Board of Regents v. Roth, supra; Arnett v. Kennedy, 416 U.S. 134 (1974); Bishop v. Wood, 426 U.S. 341 (1976), Codd v. Velger, 429 U.S. 274 (1977), there had been no occasion to specify any minimally acceptable procedures for termination of employment. The dissent cites no case establishing that appellee was entitled to more elaborate notice, or a more formal opportunity to respond, than he in fact received.

The facts involved in Davis v. Scherer, supra, are clearly distinguishable from those involved in the present cases. The employee therein was informed several times of his employer's objections to his taking other part-time employment, and he took advantage of several opportunities to present his reasons for believing that he should be permitted

to retain his part-time employment. The employee's statement of reasons and other relevant information were before the senior official who made the decision to discharge him.

As the Sixth Circuit Court of Appeals found on Page 562 of its Opinion herein, neither of the Respondents had an opportunity to present his reasons as to why he thought his termination was unjustified prior to the termination occurring.

The issue involved herein is not whether any pre-termination procedures are required; but rather, what pre-termination procedures are required.

The Respondents propose that the procedures required by the federal Lloyd-LaFollette Act, as enunciated by this Court in the case of Bush v. Lucas, ___U.S.___, 103 S. Ct. 2404, 2415-2416 (1983), be adopted by this Court as the minimal procedures required by the Due Process Clause. Counsel is satisfied that such procedures sufficiently satisfy the competing interests involved herein. See Arnett v. Kennedy, supra, p. 170 (Powell, J, concurring), and (White, J, concurring in part and dissenting in part), at pp. 195-196.

RESPONSE TO BRIEF OF THE CLEVELAND BOARD OF EDUCATION

Loudermill is obliged to respectfully disagree with the position of The Cleveland Board of Education that his termination was valid and final, since no testimony or evidence was presented to the Cleveland Civil Service Commission; and yet, the Commission's determination differed from the Referee's Findings, wherein the Referee heard evidence.

Additionally, one of Loudermill's federal constitutional claims was the delay involved in the state administrative proceedings. As such, a party does not have to exhaust his state remedies when the inadequacy thereof is part of his federal constitutional claim. See Gibson v. Berryhill, 411 U.S. 564, 575 (1973).

Further, a party cannot be bound by findings of a state administrative proceeding that does not conform to the requirements of the Due Process Clause. Kremer v. Chemical Construction Company,456 U.S. 461,481 (1982).

It would be unconscionable to require Loudermill to proceed through lengthy and expensive state court appellate proceedings that would take several years, after his state administrative proceeding was already unreasonably delayed.

The Oregon Supreme Court held in Oregon State Penitentiary v. Hammer, 556 P.2d 1348, 276 Or. 65 (1976), that some form of pretermination procedures are required before a public employee could be removed for too many absences. Certiorari was granted by this Court, see 434 U.S. 945 (1977), and the judgment was vacated for reconsideration in light of Dixon v. Love, infra , concerning the factors enumerated in Mathews v. Eldridge, 424 U.S. 319 (1976). The factors and the Court's determination, as applied to the facts at hand, was as follows:

The first factor was the private interest involved. The Court held that the interest involved in Dixon was not as important as the interest in public employment, which was closer to the "necessity" end of the scale, and also noted that in Dixon, special provision was made for commercial licensees which showed the importance of employment.

The second factor is the risks of an erroneous deprivation and the probable value, if any, of additional or substitute procedures. The Court pointed out that the deprivation in Dixon was automatic, while the termination in the present case was not, and there was a substantial risk of an erroneous deprivation by summary terminations.

The final factor is the government's interest, including the function involved, and the fiscal and administrative burdens the additional or substitute procedural requirements would entail. The Court held that the government's interest in summarily terminating public employees was not as substantial as the government's interest in taking unsafe drivers off the streets.

The Oregon Supreme Court, therefore, concluded that the case of Dixon v. Love, supra, supported their holding that some form of pre-termination procedures are required, rather than contradicting it.

The case was again taken to this Court, which denied certiorari. See 440 U.S. 935.

Accordingly, a consideration of the factors in Mathews v. Eldridge, supra, requires that some pre-termination procedures be made.

This Court has held that procedural due process rights are applicable even to temporary deprivations of property. See Fuentes v. Shevin, 407 U.S. 67,85 (1972).

Again, we are obliged to disagree with the conclusions of The Cleveland Board of Education as to the holding in Goss v. Lopez, 419 U.S. 565 (1975). That case involved the suspensions of high school students, not their expulsion. By analogy, an employee's

interest in his continued employment is at least equivalent to the interest of the free public education involved in Goss v. Lopez, supra, see Logan v. Zimmerman Brush Co., et al., 455 U.S. 422,431 (1982), and he is, therefore, entitled to some pre-termination procedures.

The principle enunciated by the plurality opinion in Arnett v. Kennedy, supra,(that the property interest is intertwined with the state procedures providing for the termination of such interest), has been rejected by a majority of this Court, and cannot be used as a basis to deny Loudermill and Donnelly any pre-termination procedures. See Vitek v. Jones, 445 U.S. 480,490-491 n.6 (1980); Logan v. Zimmerman Brush Co., et al., supra, and Santosky v. Kramer, 455 U.S. 745,755 (1982).

The case of Boehning v. Indiana State Employees Association, 423 U.S. 6,7 (1975), did not hold that a pre-termination hearing was only required when a state statute called for such a hearing. Rather, this Court only remanded the case to the state court for a determination as to whether or not the state statute required a pre-termination hearing, so that the necessity of this Court determining the federal constitutional claims could be avoided.

This Court, in Goldberg v. Kelly, 397 U.S. 254 (1970), held that a full evidentiary hearing was required prior to the termination of welfare benefits. Since it is not argued herein (although it would like to be) that the subject factual situation involves the right to a full evidentiary hearing prior to termination, the distinction made by this Court in Arnett v. Kennedy, between a terminated public employee and a welfare recipient (that the welfare benefits were necessary to sustain the life of the individual) cannot be used herein to deny a tenured public employee any pre-termination procedures.

The purpose of procedural due process is to minimize wrongful deprivations of property or liberty. See Carey v. Piphus, 435 U.S. 247,259-260 (1978). The Respondents' interest in their continued employment is a substantial interest, see Logan v. Zimmerman Brush Co., et al., supra p.434, and such an interest cannot be adequately protected without some pre-termination procedures.

Loudermill feels intensely that federal due process requirements must be applicable to all cases involving the termination of a tenured public employee, and that a person cannot be singled out on a case-by-case basis. See Jantosky v. Kramer, supra p. 757.

The government's interest can be protected in emergency situations by a short temporary suspension.

Petitioner claims that Loudermill did not have a property interest in his continued employment because he was found to have lied on his employment application. However, he was entitled to an opportunity to prove his entitlement by being given an opportunity to show that he hadn't knowingly lied. Perry v. Sindermann, 408 U.S. 593,603 (1972), and Logan v. Zimmerman Brush Co., et al., supra.

Additionally, the claimed falsification of the employment application is only possible grounds for termination. Termination is not automatic when an employee is suspected of having lied on his application.

It is hindsight for the Petitioner to now state that Loudermill would not have been hired if it had been aware of his criminal conviction that occurred approximately twelve years prior to his filling out the employment application. Query: What if Loudermill had his criminal conviction expunged prior to his filling out the employment application? Would he have been less qualified to fullfill the duties of the job he was hired for by the Petitioner?

Further, Ohio Administrative Code Sec.

124-3-04(A) prohibits the disciplining of any employee on matters which occurred more than two (2) years previous to the bringing of the charges.

RESPONSE TO BRIEF OF
PARMA BOARD OF EDUCATION

Donnelly is now obliged to respectfully disagree with the interpretation of the case of Parratt v. Taylor, supra, as stated by the Parma Board of Education. The case does not hold that a pre-termination hearing is not required if there is an adequate posttermination hearing. Rather, that case held that a pre-termination hearing was not required in instances where there was a necessity for quick action or the impracticality of providing any pre-termination procedures. In Donnelly's case, neither situation existed. In this regard, there is also the subsidiary question of whether the Ohio statutory procedure of placing the burden on the terminated employee to appeal within ten (10) days in order to assure himself of a posttermination hearing, as contrasted with a guaranteed, automatic post-termination hearing, is sufficient compliance with the Due Process Clause.

There can be no necessity of quick action, justifying a denial of pretermination

procedures, when the letter sent by the Board to Donnelly, advising him of his termination, was dated August 17, 1977 and stated that his termination was to be effective on the future date of October 7, 1977..

The present factual situation can also be distinguished from Mitchell v. W.T. Grant Co., 416 U.S. 600,611 (1974), where the property involved was substantially encumbered, and the deprived individual did not have full ownership thereto. Also, unlike the present case, the individual therein had a right to an immediate hearing to protect his interest.

The Brief position of the Parma Board, that Donnelly was affored procedural due process, is based upon the fact that he could not pass the required eye-examination, but that he was given another opportunity to take another eye-examination. All that another eye-examination would have disclosed is that his eyes were the same as when he was first examined.

However, as the Sixth Circuit Court of Appeals correctly stated in its Opinion, Donnelly did not have an opportunity to present his defense - that another favored employee couldn't pass the eye test, either, and he was not terminated.

As stated by Justice Brennan in his

Opinion, concurring in part and dissenting in part, in Davis v. Scherer, supra p. 4962:

> ... Appellee did not, however, have an opportunity to present his reasons for retaining his civil service job with the Florida Highway Patrol - the employment in which he had a protected property interest. See 543 F. Supp., at 12. Indeed, he was, according to the District Court, never told that his highway patrol job was in jeopardy, and he never had a chance to try to persuade the relevant decision maker that the second job did not create a conflict of interest. (Emphasis added) The Court concedes that our decisions by 1978 had required notice and 'some kind of hearing ... prior to discharge of an employee who had a constitutionally protected property interest in his employment.' Ante, at 8, n.9. In this case, appellee received no meaningful notice and no kind of hearing before the official who fired him. (Emphasis supplied)

It is far-fetched to state that a terminated employee is not finally deprived of his property interest in his continued employment because of the possibility that the termination decision may possibly be

reversed upon appeal. Donnelly's right to continued employment was at least as substantial as the right to a free public education involved in Goss v. Lopez, supra, see Logan v Zimmerman Brush Co., et al., supra p.431, and he was also entitled to some pre-termination procedures. Further, procedural due process is required prior to temporary deprivations of property. See Fuentes v. Shervin, supra.

The cases cited by the Parma Board, holding that no pre-termination hearings are required, can be easily distinguished from the present case. As stated by Loudermill in his Opening Brief (BRIEF FOR THE CROSS-PETITIONER) at page 5, and paraphrased, the determination of what specific due process procedures are required is directly proportional to the reliability of the ultimate decision to be made.

The case of Dixon v. Love, 431 U.S. 105 (1977), approved the summary suspension of a driver's license for excessive traffic convictions, while the cases of Mackey v. Montrym, supra, and Illinois v. Batchelder, ___U.S.___, 103 S.Ct. 3513 (1983), dealt with the suspension of a driver's license for the failure to take a breathalyzer test. And, in Ingraham v. Wright, 430 U.S. 651 (1977), that dealt with corporal punishment of students,

this Court held that the openness of the school environment made any abuses unlikely. The case of Hewitt v. Helms, ___U.S.___, ___, 103 S.Ct. 864,872-873 (1983), can also be distinguished from the present case, because it dealt with a prison population, which must be treated differently from the general population, and because the prisoner was entitled to a hearing within a few days after his transfer to administrative segregation.

It is not quite acceptable, as the Parma Board contends, that their business manager would have personal knowledge of most disciplinary cases before him for determination. For example, this Court has held, in contempt proceedings, that if the essential elements of the contempt are not personally observed, so that the judge must depend upon statements made by others for his knowledge about those essential elements, due process requires that the alleged contemnor be accorded notice and a fair hearing, at which he is given the opportunity to show that the alleged contempt related to the judge was inaccurate, misleading or incomplete. See Johnson v. Mississippi, 403 U.S. 212 (1971).

It follows then, that a tenured public employee, faced with termination, should be given the opportunity to show the business

manager that such disciplinary action is unwarranted according to the relevant facts.

Unlike the cases relied upon by the Parma Board, the present case deals with a broad fault standard, where the credibility of witnesses is important. See Califano v. Yamasaki, 442 U.S. 682,696-697 (1979).

This Court stated in Mackey v. Montrym, supra p. 13, that a post-termination hearing was adequate if the pre-deprivation procedure employed is sufficiently reliable - which is not the case involved in the termination of a tenured public employee.

Donnelly would also like to point out that the case of Dixon v. Love, supra, was previously distinguished from the case of a terminated tenured public employee based upon a consideration of the factors enunciated in Mathews v. Eldridge, supra p. 335. See the case of Oregon State Penitentiary v. Hammer, supra.

Since Donnelly was not permitted to present his defense, that another employee who could not pass the eye-examination was not terminated, the present case can be distinguished from Mathews v. Eldridge, supra, which solely involved a medical determination. For a lengthier examination of the Mathews case, please refer back to Page 10 of Loudermill's

Opening Brief.

Further, the issue involved in Mathews was whether or not a prior full evidentiary hearing was required, which is not the issue in the present case. The party in Mathews, unlike Donnelly, was permitted to submit written evidence prior to the deprivation of his benefits.

As stated previously, the denial of any pre-termination procedures cannot be based upon the plurality decision in the case of Arnett v. Kennedy, supra. By this Court's recent decision in Davis v. Scherer, supra p. 4698 n.10, the right to some kind of hearing for a tenured public employee, prior to his termination, was established with this by the 1972 decision of Board of Regents v. Roth.

Since the Ohio courts have held that the thirty (30) day requirement for a posttermination hearing contained in Ohio Revised Code Section 124.34 is not mandatory; see In re Brenker, 53 Ohio Misc. 13 (1977), a terminated tenured public employee is not guaranteed a hearing within forty (40) days of his termination - which is contrary to the position taken by the Parma Board in their Brief.

Further, post-termination procedures would not be sufficient to protect the

employee's interest, since the decision of the employer is given weight in the appeal. See Goss v. Lopez, supra pp. 580-581 n.10.

RESPONSE TO THE BRIEF OF THE OHIO ATTORNEY GENERAL AND NINETEEN OTHER STATES

The first part of the Attorney General's Brief is based upon this Court's plurality Opinion in Arnett v. Kennedy, supra. As has been stated, the principle contained therein has now been rejected by a majority of this Court. Additionally, the case of Parratt v. Taylor, supra, supports the position of both Loudermill and Donnelly that some pretermination procedures are required.

The Attorney Generals correctly state that only once has this Court held that a prior full evidentiary hearing was required, citing Goldberg v. Kelly, supra. However, the issue involved herein is not whether a full evidentiary hearing is required prior to the termination of a tenured public employee, but whether some mandatory pre-termination procedures are required.

The quote from Mackey v. Montrym, 443 U.S. 1,13 (1979), on Page 14 of the Attorney General's Brief, supports the Respondents' position that some pre-termination procedures are required.

Without some pre-termination procedures being afforded to an employee to respond to charges against him, there is no justification for the employer to have "... a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be."

It is clear, therefore, that some pre-termination procedures are required herein. See Davis v. Scherer, supra p. 4958 n.10.

CONCLUSION

Both lower courts found that Loudermill had a property interest, protected by the Due Process Clause, in his continued employment, and since such findings are not clearly erroneous, there is no reasonable basis for disturbing that conclusion. See Rule 52(a) of the Federal Rules of Civil Procedure.

Further, the Cleveland Board discharged Loudermill in a manner that would be used to discharge a classified civil service employee who could only be discharged for "cause," and it cannot now be contended by them that he did not have a protected property interest in his continued employment. See Service v. Dulles, 354 U.S. 363 (1957).

The Ohio statute involved herein, Ohio Revised Code Section 124.34, fails to provide

any state machinery that guarantees a terminated tenured employee pre-termination procedures of any kind.

Further, the statute does not provide an automatic and guaranteed post-termination hearing, unless the discharged employee takes affirmative action within the unreasonably short statute of limitations period of ten (10) days. As such, the post-termination procedures are an appeal, rather than a hearing as of right.

By virtue of the Davis v. Scherer case decision, the right to some pre-termination procedures have existed since this Court's decision in Board of Regents v. Roth, supra.

Therefore, the issue involved herein is not whether some pre-termination procedures are required; but rather, what extent of pre-termination procedures are required by the Due Process Clause.

But all of the above is meaningless, unless this Court provides some sanction against arbitrary state action that is violative of federal due process guarantees, and will compel governmental compliance with this Court's decision - if that decision should look favorably upon the arguments and reasoning of Loudermill and Donnelly.

In Loudermill's Opening Brief, counsel

spoke of an imaginary U.S. Supreme Court police force that could immediately respond and enforce the United States Constitution. Any decision that lacks a compelling reason for compliance by arbitrary governmental employers is a decision that can, and will, be ignored with immunity by indifferent governmental employers and administrative review boards, as they know the arduous labor, time and expense involved in appeal. Accordingly, what is needed in any favorable decision is both clarity of governmental obligation and teeth. Otherwise, the paper decision is a paper tiger.

On Pages 28-29 of Loudermill's Opening Brief, it is suggested that a deprivation of the property interest in continued public employment is as consequential as the denial of a speedy trial. That if there is a denial of a speedy trial, almost immediate relief is afforded the accused. So too, there should be immediate relief (without time consuming and prohibitively expensive appeals) when a tenured public employee is terminated without any automatic, guaranteed and sufficiently timely full evidentiary hearing being given.

It is now suggested that such prompt relief can be afforded through the federal court system by virtue of language contained

in Bishop v. Wood, 426 U.S. 341,349-350 n.14 (1976):

> ... the fact of the matter, however, is that the instances in which the federal judiciary has required a state agency to reinstate a discharged employee for failure to provide a pretermination hearing are extremely rare. The reason is clear. ..... the ultimate control of state personnel relationships is, and will remain, with the states. They may grant or withhold tenure at their unfettered discretion.
>
> However, where the state has chosen to grant tenure, as the state of Ohio has done herein, so that classified civil servants such as Loudermill and Donnelly, who successfully completed their probationary periods, then the federal courts have the power to promptly order the reinstatement of any tenured employee who was discharged without being provided the pre-termination procedures that will, hopefully, be specified by this Court in its Opinion.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Office - Supreme Court, U.S.
FILED
AUG 29 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 83-1362 & 83-1363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CLEVELAND BOARD OF EDUCATION,
Petitioner,
v.
JAMES LOUDERMILL,
Respondent.

PARMA BOARD OF EDUCATION,
Petitioner,
v.
RICHARD DONNELLY,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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---

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* is filed with the consent of the parties, pursuant to Rule 36.2 of this Court's Rules.

STATEMENT OF INTEREST

The National Education Association ("NEA") is a nationwide employee organization, with a current membership of over 1.6 million members, the vast majority of whom are employed by public educational institutions. NEA operates through a network of affiliated organizations: it has as state affiliates an organization in each of the 50 States, the District of Columbia and Puerto Rico, and it has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States. One of the principal purposes of NEA and its affiliates is to protect the constitutional rights of teachers, professors and other educational employees. Because the Court is being asked to decide issues of vital importance to the effective vindication of teachers' constitutional rights and the effective protection of teachers' property interests in continued employment, NEA and its members have a substantial interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

These consolidated cases, each brought under 42 U.S.C. § 1983, present the question whether—consistent with the Due Process Clause of the Fourteenth Amendment—a public school employee, who is guaranteed employment "during good behavior and efficient service" and who can be dismissed only for cause, may be summarily discharged without first having been furnished a statement of the reasons for the contemplated discharge and an opportunity to respond to those reasons. Acting *sua sponte*, the District Court dismissed the employees' complaints even before responsive pleadings were filed. The Court of Appeals reversed. Applying controlling principles established in this Court's decisions, the Court of Appeals held that the "failure to afford Loudermill and Donnelly an opportunity [prior to dismissal] to present evidence challenging the proposed discharges violated the Fourteenth Amendment." 721 F.2d at 563 (footnote omitted).

It is clear that respondents Loudermill and Donnelly had property interests in their continued employment. Loudermill and Donnelly were tenured employees in the classified civil service of the Cleveland and Parma school districts, respectively. Pursuant to Ohio Revised Code § 124.34, respondents could not "be reduced in pay or position, suspended, or removed," except for the reasons specified in that section. Ohio Rev. Code § 124.34; see *Verberg* v. *Board of Education*, 135 Ohio St. 246, 20 N.E.2d 368 (1939); *State ex rel. Proctor* v. *Board of Education*, 60 Ohio App. 2d 396, 398 N.E.2d 805 (1978).[1] As the lower courts concluded, and as the State of Ohio acknowledges before this Court (Amicus Br. at 6), Loudermill and Donnelly therefore possessed "a legitimate claim of entitlement to continued employment absent sufficient cause for discharge." *Goss* v. *Lopez*, 419 U.S. 565, 573 (1975). See *Loudermill* v. *Cleveland Board of Education*, 721 F.2d 550, 559 (6th Cir. 1983); *Jackson* v. *Kurtz*, 65 Ohio App. 2d 152, 157-58, 416 N.E.2d 1064, 1068 (1979); [1981] Op. Ohio Att'y. Gen. No. 81-100, at 2-378. Accordingly, Loudermill and Donnelly "may demand the procedural protections of due process" and are subject to deprivation of their property interests in continued employment only through procedures that satisfy the requirements of the Due Process Clause of the Fourteenth Amendment. *Goss* v. *Lopez*, *supra*, 419 U.S. at 573.[2]

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[1] Specifically, Ohio Revised Code § 124.34 provides that an employee may be demoted, suspended or discharged "for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office."

[2] Petitioner Cleveland Board of Education argues that, Ohio Revised Code § 124.34 notwithstanding, Loudermill has no property interest at stake here because the inaccurate statement on his em-

The issue before the Court, therefore, is whether petitioner Boards of Education, by providing Loudermill and Donnelly only notice at the time of discharge of the rea-

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ployment application means that Loudermill never had a legitimate claim of entitlement to his job. (Br. at 14-15) It does not appear from the record that petitioner raised this argument in the courts below, and, in any event, petitioner's argument is wrong.

First, the Cleveland Board of Education's argument lacks any factual support. On the present state of the record, the Court can only conclude that the inaccurate statement on Loudermill's application was an honest mistake regarding events that had occurred eleven years earlier, Loudermill Complaint ¶ 19, and not, as the Board of Education baldly asserts, a "lie[]." (Br. at 14) Nor can the Cleveland Board of Education offer any record support for its assertion that, had it known of Loudermill's decade-old conviction, "he would have immediately been excluded from any position relating to school security." (*Ibid.*)

Second, the Board's argument is legally incorrect. The Board of Education has never disputed that Loudermill was a classified civil service employee and, under Ohio law, could only be discharged for cause. In these circumstances, this Court's decisions establish that whether or not cause is ultimately found to exist, Loudermill nevertheless had a claim of entitlement which entitled him to due process. In *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), for example, the welfare recipients had a claim of entitlement to welfare payments grounded in the statute that defined eligibility. Although "[t]he recipients had not yet shown that they were, in fact, within the statutory terms of eligibility," this Court "held that they had a right to a hearing at which they might attempt to do so." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). As the Court stated in *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978), "the right to procedural due process . . . does not depend upon the merits of a claimant's substantive assertions." See also *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

Thus, petitioner Cleveland Board of Education's reliance on the misstatement in Loudermill's employment application is misplaced. That misstatement means only that, if petitioner's factual assertions were shown to be true, the Board might have cause to discharge Loudermill after meeting the procedural requirements mandated by the Due Process Clause; it does not mean that, merely because the Board of Education believes its own factual assertions, it could constitutionally dispense with those procedural requirements.

sons for discharge and a post-discharge evidentiary hearing, but no opportunity to respond to the reasons before discharge, afforded respondents due process. That question—whether the complete denial to a public employee of any pre-discharge statement of reasons and opportunity to be heard affords the employee due process—is one whose answer must be found in the Constitution, not in the State statute creating the property interest. "As [this Court's] cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." *Arnett* v. *Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring), *quoted in Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982).[3] It is that constitutional question that we address in this brief.

1. As we show in Part I, the issue presented is not one of first impression in this Court. On the contrary, this Court's due process decisions have repeatedly rec-

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[3] Petitioner Parma Board of Education and *amicus* State of Ohio would resurrect the argument that where a statute that creates an entitlement also establishes certain procedures governing the award and deprivation of that entitlement, the statutory procedures are, by definition, all the process that is due. (Parma Br. at 25-27; Ohio Br. at 5-10) The Parma Board of Education and the State of Ohio acknowledge that their position was supported by only a plurality of the Court in *Arnett* v. *Kennedy*, *supra*, the case upon which they principally rely. They fail to mention, however, that their position was rejected by a clear majority of the Court in *Arnett* v. *Kennedy*, see 416 U.S. at 167 (Powell, J., concurring); *id.* at 185 (White, J., concurring in part and dissenting in part); *id.* at 211 (Marshall, J., dissenting), and has been dispositively laid to rest in two subsequent decisions. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982); *Vitek* v. *Jones*, 445 U.S. 480, 490-91 & n.6 (1980). "Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest." *Logan* v. *Zimmerman Brush Co.*, *supra*, 455 U.S. at 432. The Parma Board of Education and the State of Ohio offer no reason why the Court should ignore the commands of *stare decisis* and now adopt their thrice-rejected position.

ognized the central importance of a statement of reasons and a meaningful opportunity to be heard before an individual is deprived, even temporarily, of a property interest. The Court's decisions have therefore held that a tenured public employee has the right—a right that was not recognized here—to notice and an opportunity to be heard before he is discharged from public employment.

Petitioners' efforts to avoid the force of these precedents are wide of the mark. The Court's decisions in *Mathews* v. *Eldridge* and *Arnett* v. *Kennedy* provide petitioners with no support, as the individuals affected in each of those cases, while not afforded a full evidentiary hearing before the deprivation of their property interests, were afforded meaningful pre-deprivation procedures which minimized the risk of error in the initial deprivation decisions. Nor can petitioners rely on decisions in which this Court has approved summary administrative actions in "extraordinary" situations where some valid governmental interest requires prompt action. Petitioners offer nothing to support their suggestion that the circumstances surrounding the discharge of respondents here, or surrounding the discharge of public employees in general, constitute emergency situations justifying a disregard for the ordinary dictates of due process.

2. In Part II, we respond to petitioners' implicit request that this Court reexamine and overturn the well-established principle that some opportunity to be heard (albeit less than a full evidentiary hearing) must precede discharge from tenured public employment. As we there show, all of the factors that could arguably be relevant in resolving that question, were it to be considered anew, point to the result this Court has already reached. First, the affected employee has powerful interests in securing pre-deprivation process: to avoid temporary interruption of income, to avoid permanent loss of income and/or job status when post-termination process cannot assure re-

instatement with full backpay, to avoid the psychological injuries attendant upon the uncertainty of job status and the loss (even if temporary) of the opportunity to pursue's one's chosen profession, and to invoke the employer's discretion not to discharge even if the facts would *permit* that course (and thus would preclude post-termination reversal). Second, the risk of error is greatly magnified if there is no pre-deprivation process, in part because the issues in a post-termination hearing are not the same as those that are present pre-termination (e.g., the fact that post-termination backpay would saddle the employer with double costs is a significant practical deterrent to a post-termination decisionmaker (which may be the employer itself) ruling in the employee's favor). Third, there are no significant governmental interests that are jeopardized by affording a pre-termination opportunity to be heard, as suggested by the fact that the federal government—the largest employer—provides such an opportunity; indeed, to the extent that pre-termination process pretermits erroneous discharges, the government enjoys substantial benefits from the process.

ARGUMENT

I. THIS COURT'S DECISIONS ESTABLISH THAT A PUBLIC EMPLOYEE MUST BE AFFORDED NOTICE OF REASONS AND AN OPPORTUNITY TO BE HEARD BEFORE THE EMPLOYEE IS INITIALLY DEPRIVED OF A PROPERTY INTEREST IN CONTINUED EMPLOYMENT.

A. The due process decisions of this Court have repeatedly recognized the central importance of a statement of reasons and an opportunity to be heard before a person is deprived, even temporarily, of a liberty or property interest. As Justice Jackson explained,

> Many controveries have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that

> deprivation of life, liberty or property . . . be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).[4] And, over twenty years later, Justice Harlan noted that while "[t]he formality and procedural requisites for the hearing can vary," there remains the "root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Boddie* v. *Connecticut*, 401 U.S. 371, 378-79 (1971) (emphasis in original; footnote omitted). Accord, e.g., *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 19 (1978); *Bell* v. *Burson*, 402 U.S. 535, 542 (1971). The Court has thus invalidated State statutes that deprived persons of their property without pre-deprivation notice and hearing, even though the State offered post-deprivation procedures which could ultimately restore the person's property. E.g., *Memphis Light, Gas & Water Division* v. *Craft*, *supra*, 436 U.S. at 19-20 & n.26; *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Southern Railway* v. *Virginia*, 290 U.S. 190, 199 (1933); *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 423 (1915).

This general principle—that due process entitles an individual to notice and an opportunity to be heard before he is deprived of property—has been consistently applied by this Court to tenured public employees who are threatened with the deprivation of their property interests in continued employment. "When protected interests are implicated, the right to some kind of prior hearing is paramount." *Board of Regents* v. *Roth*, 408 U.S.

[4] Justice Jackson's opinion in *Mullane* specifically referred to deprivations that take place "by adjudication." This qualification was meant only to distinguish individualized deprivations from deprivations by subsequent legislation—deprivations to which the same analysis does not apply. The qualification for deprivations by legislative act has no relevance to the instant cases.

564, 569-70 (1972); see also *id.* at 570 nn. 7-8; *Perry* v. *Sindermann*, 408 U.S. 593, 599 (1972). Indeed, only last Term the Court unanimously recognized that its decisions "ha[ve] required 'some kind of hearing' prior to discharge of an employee who ha[s] a constitutionally protected property interest in his employment." *Davis* v. *Scherer*, —— U.S. ——, —— n.10, 104 S. Ct. 3012, 3019 n.10 (1984) (quoting *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 570 n.7); see *id.*, 104 S. Ct. at 3023-24 (Brennan, J., concurring in part and dissenting in part).[5]

Here, neither Loudermill nor Donnelly was afforded any opportunity to be heard, regarding either the proposed reasons for his discharge or the employer's intended exercise of its hiring and firing discretion, at any time prior to his discharge. Instead, Loudermill and Donnelly were provided only with the opportunity to appeal to the municipal civil service commissions *after* they were discharged. Plainly, the process afforded them did not conform to the dictates of this Court's due process decisions.

[5] In *Davis* v. *Scherer*, it was undisputed that Scherer had been deprived of his procedural due process rights to pre-discharge notice and hearing. 104 S. Ct. at 3017-18. The issue before the Court was whether the individual defendants could assert a qualified immunity from damages on the ground that the precise form of their conduct, while concededly unlawful, had not violated Scherer's "'clearly established . . . constitutional rights.'" *Id.* at 3018 (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). The Court did not doubt that the right to some form of pre-discharge hearing was "clearly established." See *id.* at 3019 n.10. Rather, the Court found it not "unreasonable . . . for the Department to conclude that [Scherer] had been provided with the fundamentals of due process" prior to discharge through the "several opportunities [he had] to present his reasons that he should be permitted to retain his part-time employment despite the contrary rules of the Patrol." *Id.* at 3019. Significantly, while the Court in *Davis* v. *Scherer* did not rule that the minimal pre-discharge process afforded there was constitutionally adequate, respondents here were afforded no pre-discharge process.

B. Petitioners Cleveland Board of Education and Parma Board of Education would avoid the force of these precedents in two fashions. Petitioners rely primarily on this Court's decisions in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), and *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), which held, respectively, that the Due Process Clause does not require a full evidentiary hearing prior to the discharge of a federal employee or prior to the termination of disability benefits. And petitioners further rely on various decisions of this Court which approved, "in limited circumstances, immediate seizure of a property interest, without an opportunity for prior hearing, [where] 'directly necessary to secure an important governmental or general public interest, [and where] there [is] a special need for very prompt action.'" *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 678 (1974) (quoting *Fuentes* v. *Shevin*, 407 U.S. 67, 91 (1972)). As we now show, neither of these approaches is availing to petitioners here.

1. As petitioners correctly note, this Court's decisions in *Mathews* v. *Eldridge* and *Arnett* v. *Kennedy* approved procedures for the deprivation of property interests which, as here, postponed full evidentiary hearings until after the initial deprivation. But petitioners can draw no support from those holdings, for, unlike here, the procedures at issue in *Mathews* v. *Eldridge* and *Arnett* v. *Kennedy* provided the affected individuals a meaningful opportunity to be heard *before* the initial deprivation of their property interests.

In *Mathews* v. *Eldridge*, an individual was threatened with a loss of Social Security disability benefits. Before those benefits were terminated, the beneficiary was "afforded an opportunity to review the medical reports and other evidence in his case file," to "respond in writing" to the agency's determination, 424 U.S. at 338 (footnote omitted), and "to submit additional evidence or arguments, enabling him to challenge directly the accuracy of

the information in his file as well as the agency's tentative conclusions," *id.* at 346. Because the Social Security Act dictated that the key issue in the termination decision was "a medical assessment of the worker's physical or mental condition," *id.* at 343, these procedures afforded the beneficiary "an effective process for asserting his claim prior to any administrative action," *id.* at 349.[6]

Similarly, in *Arnett* v. *Kennedy*, an employee was threatened with discharge from the federal civil service. Prior to discharge, the employee was provided "advance written notice of the reasons for his proposed discharge," "the right to respond to the charges both orally and in writing," and "an opportunity to appear personally be-

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[6] Petitioner Parma Board of Education contends that because the basis for Donnelly's discharge was his failure to pass an eye examination, his "case is the same as the social security disability claimant's case in *Mathews* v. *Eldridge*." (Br. at 23) Petitioner is mistaken. By statute, the inquiry central to the termination of disability benefits is "a medical assessment of the worker's physical or mental condition," 424 U.S. at 343; the beneficiary cannot challenge the relevance of the medical assessment to his entitlement to disability benefits, *cf. Heckler* v. *Campbell*, —— U.S. ——, 103 S. Ct. 1952 (1983). By contrast, Ohio Revised Code § 124.34 makes no reference to discharge of a civil service employee for failure to meet any specific medical criteria; an employee, such as Donnelly, can therefore question whether his failure to meet certain medical criteria is sufficiently job-related as to constitute cause for discharge.

This distinction from *Mathews* v. *Eldridge* is highlighted by the facts of this case. Because Donnelly was denied any opportunity to be heard before his discharge, he was unable at that time to point out that his eye examination was irrelevant to his job qualifications, as evidenced by the fact that the Parma Board of Education employed other bus mechanics who had failed the same eye examination. Notably, when Donnelly was given a hearing nine months *after* his discharge by the Parma Civil Service Commission, the Commission concluded that Donnelly's failure to pass an eye examination was not a sufficient basis for discharge and disaffirmed the Board of Education's action.

fore the official having the authority to make or recommend the final decision." 416 U.S. at 170 (Powell, J., concurring). While three Justices opined that these procedures failed to satisfy the requirements of due process, Justice Powell, in an opinion joined by Justice Blackmun which was necessary to form a majority of the Court, concluded that these pre-discharge procedures "comport[ed] with due process" as their use "minimize[d] the risk of error in the initial removal decision." *Id.* at 170-71. See also *id.* at 195-96 (White, J., concurring in part and dissenting in part).

In contrast to the extensive pre-deprivation procedures made available in *Arnett* v. *Kennedy* and *Mathews* v. *Eldridge*, respondents Loudermill and Donnelly were afforded no statement of reasons or opportunity to be heard before they were discharged. Those cases thus do not support petitioners' position here. Contrary to petitioners' claims, this Court did not hold in *Arnett* v. *Kennedy* and *Mathews* v. *Eldridge* that the procedures there would have complied with the requirements of due process if no pre-deprivation process had been provided. Indeed, in those cases the Court said that the pre-deprivation procedures served the important purpose of "minimiz[ing] the risk of error" in the initial decisions. *Arnett* v. *Kennedy*, 416 U.S. at 170 (Powell, J., concurring). See *Mathews* v. *Eldridge*, 424 U.S. at 349 ("the prescribed procedures . . . provide the claimant with an effective process for asserting his claim prior to any administrative action").

2. Petitioners rely as well on decisions of this Court recognizing that there can be "extraordinary situations where some valid governmental interest is at stake that justifies postponing" all process until after the deprivation of a property interest. *Boddie* v. *Connecticut*, *supra*, 401 U.S. at 379. Accord, e.g., *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, *supra*, 416 U.S. at 678-79; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) ("so rare as

to be isolated instances").[7] But no such "extraordinary" circumstances are present here.

Petitioners offer nothing that would constitute the kind of "emergency situations" where "summary administrative action may be justified." *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 300 (1981). Respondent Loudermill had been employed as a security guard for the Cleveland Public Schools for well over a year, without incident or complaint. Only through a routine record check, unrelated to Loudermill's job performance, did the Schools' Department of Safety and Security learn of his conviction, which had occurred twelve years earlier and had not been repeated. Loudermill Complaint ¶¶ 12-13, 16-17. The Cleveland Board of Education then dismissed Loudermill, "not because of his prior conviction per se, but because of alleged dishonesty" on his employment application. 721 F.2d at 562. Contrary to the unsupported assertions of petitioner Cleveland Board of Education (Br. at 11-13), the record thus suggests no reason why the Board of Education could not afford Loudermill some opportunity to present his side of

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[7] In *Parratt* v. *Taylor*, 451 U.S. 527, 539 (1981), the Court explained that "either the necessity of quick action by the State or the impracticality of providing any meaningful pre-deprivation process can, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, satisfy the requirements of procedural due process." We do not understand petitioners to rely on the "impracticality" prong of the *Parratt* analysis. Nor could they do so. Respondents were deprived of their property interest through an "established state procedure" for discharging public employees. Ohio Rev. Code § 124.34. And, as the Court made clear last Term, the impracticality exception announced in *Parratt* therefore has no application here: "[P]ostdeprivation remedies [alone] do not satisfy due process where a deprivation of property is caused by conduct pursuant to an established state procedure." *Hudson* v. *Palmer*, —— U.S. ——, ——, 104 S. Ct. 3194, 3203 (1984) (citing *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982)). See also *id.*, 104 S. Ct. at 3204.

the story—that he had not been dishonest on his employment application, but had made an honest mistake—prior to his discharge. See 721 F.2d at 562.

Similarly, respondent Donnelly's failure to pass an eye examination was not an emergency situation justifying a disregard for the ordinary dictates of due process. The Parma Board of Education does not allege that Donnelly's job performance had been unsatisfactory or, for that matter, that the eye examination was in any way job-related. Indeed, it is undisputed that the Parma School District employs other bus mechanics who failed the same eye examination. Donnelly Complaint ¶ 16. And when Donnelly was finally afforded an opportunity to be heard nine months after his discharge, the Parma Civil Service Commission ordered him reinstated to his job—an order that the Parma Board of Education did not appeal and does not challenge now. *Id.* ¶¶ 14, 22. Thus, there is no apparent reason why Donnelly was compelled to wait until after his discharge to explain that the eye examination was unrelated to his job as a mechanic: "No emergency was even conceivable with respect to Donnelly." 721 F.2d at 562.

To be sure, circumstances can be envisioned in which an exception to the general rule of pre-discharge notice and an opportunity to be heard would be justified, i.e., "if the employee would be likely to do damage to the Government" unless immediately removed from the workplace. *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 195 (White, J., concurring in part and dissenting in part); cf. *Goss* v. *Lopez*, *supra*, 419 U.S. at 582 ("Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school."). But simply because there may occasionally be an exceptional situation requiring prompt action cannot justify a rule of general application denying all public employees an opportunity to be heard before discharge from public employ-

ment. The requirements of procedural due process are shaped by the factors applicable "to the generality of cases," *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 344; and most reasons for discharging public employees do not involve "emergency situations" justifying the denial of any opportunity to be heard before discharge. To allow concerns for the rare "emergency" discharge cases to justify a universal denial of pre-discharge hearings, as petitioners seem to argue for here, would improperly allow the exception to swallow the rule.

II. EVEN IF THE COURT WERE PREPARED TO CONSIDER ANEW ITS DECISIONS REQUIRING A PRE-DISCHARGE NOTICE OF REASONS AND OPPORTUNITY TO BE HEARD, THE DEFICIENCIES INHERENT IN PURELY POST-DEPRIVATION PROCEDURES WOULD REQUIRE A REAFFIRMATION OF THE REQUIREMENT OF PRE-DISCHARGE PROCESS.

As we have shown, this Court's decisions establish that a public employee with a property interest in continued employment is entitled to a statement of reasons and an opportunity to be heard before he is initially discharged from his employment. See pages 7-15 *supra*. Petitioners, without acknowledging the thrust of their argument, thus ask this Court to overturn its prior decisions and to set aside an established body of law. Petitioners seek to do so by subjecting the question of the *need* for pre-deprivation process to a balancing of the factors identified by the Court in *Mathews* v. *Eldridge* for evaluating the *form* of the requisite process. As the Court explained in *Mathews* v. *Eldridge*, the three factors relevant to the latter inquiry are the private interest, the Government's interest, and the probable value of additional procedures in reducing the risk of error. 424 U.S. at 335. But "[t]he constitutional requirement of opportunity for *some* form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow

balancing process." *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 570 n.8 (emphasis in original). "[T]he Court has traditionally insisted that, whatever its form, opportunity for [a] hearing must be provided before the deprivation at issue takes effect." *Fuentes* v. *Shevin*, *supra*, 407 U.S. at 82.

It would therefore be inappropriate for the Court to engage, as petitioners suggest, in a balancing of the *Mathews* v. *Eldridge* factors in order to assess whether *some* opportunity to be heard is constitutionally required before a public employee is discharged. (And, as respondents here were afforded no pre-termination process whatever, there is no occasion to decide the precise form of process to which they were entitled.) But, as we now show, even if the Court were prepared to reexamine this well-settled proposition of law, and even if the necessity of a pre-discharge opportunity to be heard were subjected to the balancing process of *Mathews* v. *Eldridge*, this Court's consistent holdings that pre-deprivation process is required would be vindicated.

A. *Private Interest.* Petitioner Boards of Education argue that "[t]he private interest at issue in this case is only the avoidance of delay in the receipt of income from public employment." (Parma Br. at 14; see Cleveland Br. at 9) Petitioners then contend that this temporary loss of income is so insignificant as to require no pre-deprivation process. Petitioners are wrong on three counts.

First, this Court has previously recognized that "the hardship imposed [by an erroneous interruption of income] may be significant." *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 342. As Justice Powell stated in *Arnett* v. *Kennedy*, "even a temporary interruption of income would constitute a serious loss in many instances." 416 U.S. at 169. Thus, this Court has previously held that "the interim freezing" of *one-half* of an individual's wages is a significant deprivation which, when accomplished "without a chance to be heard[,] violates procedural due process." *Sniadach* v. *Family Finance Corp.*, *supra*, 395 U.S. at 340. While a delay in the receipt of income may not be sufficiently weighty to require a full *evidentiary* hearing prior to an employee's discharge, *Arnett* v. *Kennedy*, *supra*, even a temporary loss of income is sufficiently important to require some opportunity to be heard before a public employee is discharged. See *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 606 (1975); *Sniadach* v. *Family Finance Corp.*, *supra*, 395 U.S. at 342 (Harlan, J., concurring).

That loss of income becomes all the more significant where, as here, it may easily extend over a period of several months. *Fusari* v. *Steinberg*, 419 U.S. 379, 389 (1975); *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 192 (White, J., concurring in part and dissenting in part) ("The impact of the deprivation increases, of course, the longer the time period between the initial deprivation and the opportunity to have a full hearing."). Although the Ohio statute promises a discharged public employee an initial hearing within thirty days, Ohio Rev. Code § 124.34, that language is merely hortatory, e.g., *In re Bronkar*, 53 Ohio Misc. 13, 17, 372 N.E.2d 1345, 1347 (1977); and, in any event, the Ohio statute prescribes no time limits for the referee's decision and for ensuing review by the civil service commission and appeals to the Ohio courts. In Loudermill's case, for example, over eight months passed between the filing of his appeal and the civil service commission's decision. The record gives no reason to believe that such delays—and the attendant loss of income following the initial discharge—are not common.[8]

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[8] It is no answer to contend that a discharged public employee "can avoid . . . a temporary loss of income by obtaining other employment." (Parma Br. at 15). "[T]he employee may not be able to get a satisfactory position in the private sector, . . . and his marketability may be under a cloud due to the circumstances of his dismissal." *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 194 (White, J.,

Second, a temporary delay in income will often not be the only injury that a public employee would suffer from discharge. There is also the prospect in many situations that the available post-deprivation process may not make a wrongfully discharged employee "entirely whole." *Logan* v. *Zimmerman Brush Co.*, *supra*, 455 U.S. at 437. In those instances, the private interest affected by a summary discharge is far more than a temporary delay in income or in the return to a job; it is an interest in avoiding a permanent deprivation, either of income and monetary benefits (where full backpay and benefits may not be forthcoming) or of a job (where reinstatement may be unavailable). Indeed, while the Parma Board of Education argues in this case that under Ohio Revised Code § 124.34 "back pay is automatic if a civil service commission disaffirms a discharge decision and orders reinstatement" (Parma Br. at 14 n.6 (emphasis deleted)), backpay has not in fact been so "automatic" as to be provided to respondent Donnelly.[9] Donnelly Complaint ¶¶ 22, 27. Wherever the available post-deprivation process does not guarantee that a wrongfully discharged employee will be made entirely whole, the private interest is more than "the avoidance of delay in the receipt of income."

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concurring in part and dissenting in part). "Even aside from the stigma that attends a dismissal for cause, few employers will be willing to hire and train a new employee knowing that he will return to a former Government position as soon as an appeal is successful." *Id.* at 219 (Marshall, J., dissenting) (footnote omitted).

[9] It appears that under Ohio law, while a municipal civil service commission "may affirm, disaffirm, or modify the judgment of the appointing authority," Ohio Rev. Code § 124.34, a "Civil Service Commission does not have the power to award backpay." 721 F.2d at 554 n.3, and cases cited therein. Instead, a reinstated public employee who is not voluntarily given backpay by his employer must seek backpay by filing a separate, original petition for mandamus in the Ohio Courts of Appeals. See *State ex rel. Colangelo* v. *McFaul*, 62 Ohio St. 2d 200, 404 N.E.2d 745 (1980); *State ex rel Martin* v. *City*

Moreover, even if an erroneously discharged employee is ultimately made whole in a monetary sense, the employee may nevertheless suffer a psychological deprivation that, although intangible, is no less real. A discharged employee may spend several months not knowing whether he will be reinstated to his job or whether, in the end, his discharge will be affirmed. The trauma of these several months, which will often pass without obtaining other employment, is an injury for which Ohio's post-deprivation procedure provides no recompense. And the loss will be redoubled for the many public servants for whom money is not the principal attraction of their employment. For these individuals, the opportunity to perform the job and the accompanying non-monetary rewards of public service form an integral part of their interest in continued employment. Many public employees would not be satisfied if they were merely paid their salaries, but were denied the opportunity to perform their work. This point is undoubtedly true with respect to judges, prosecutors, teachers, policemen, social workers, and other public employees—many of whom, if interested solely in money, could earn more in the private sector

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of Columbus Dep't of Health, 58 Ohio St. 2d 261, 389 N.E.2d 1123 (1979).

Here, the Parma Board of Education concedes for present purposes that Donnelly was "wrongfully terminated," but suggests that on remand it would argue that the civil service commission did not "disaffirm" Donnelly's discharge, but instead "converted [it] to a suspension without pay," thus denying Donnelly any right to backpay. (Parma Br. at 15 & n.7) We frankly do not understand (at least on the present record) how the Board of Education can argue that even though failure to pass an eye examination was not sufficient cause for discharge, it was sufficient cause for a lengthy suspension without pay, following which Donnelly was reinstated to his previous job. That such a result may be possible under Ohio law, or that Donnelly must engage in further litigation to convince the Board of Education otherwise, evidences the deficiencies inherent in purely post-deprivation process.

than they are paid in public service.[20] For these individuals, an erroneous discharge deprives them of the opportunity to perform the job while they await the outcome of their appeal—a permanent deprivation which cannot be remedied through post-discharge relief. See *Allen* v. *Autauga County Board of Education*, 685 F.2d 1302, 1306 (11th Cir. 1982).

Third, a discharge without a prior opportunity to be heard denies a public employee the opportunity to invoke his employer's discretion. There are many cases where an employee's actions would legally support a decision to discharge but where, if the full facts were known (including the mitigating facts that the employee would tender), the employer might conclude in its discretion not to visit the ultimate sanction of discharge. For that reason, an employee has an obvious interest in having an opportunity to be heard *before* his employer makes the discharge decision: only by that pre-discharge process might the employee be able to invoke the employer's discretion and prevent the loss of his job. For most post-discharge procedures, as here, examine only whether the discharge was permissible, not whether the employer would have imposed discharge if it had been possessed of all the facts. In those situations, an employee's interest will be not only "the avoidance of delay in the receipt of income from public employment," but his entire property interest ni continued employment. See also pages 22-23 *infra*.

B. *Probable Value of Pre-Discharge Procedure.* It would seem unquestionable that a procedure giving an individual some opportunity to be heard before he is deprived of a property interest is less likely to result in an erroneous deprivation than a procedure, such as is pre-

[20] The importance of the non-monetary benefits of public employment, with emphasis on the non-monetary rewards associated with teaching, is elaborated upon in the brief *amici curiae* jointly filed last Term by NEA and the American Civil Liberties Union in *Vail* v. *Board of Education*, No. 83-87.

sented here, which affords an individual no such opportunity. "[R]equiring effective notice and informal hearing permitting the [employee] to give his version of the events will provide a meaningful hedge against erroneous action. At least the [employer] will be alerted to the existence of disputes about facts and arguments about cause and effect. . . . [H]is discretion will be more informed and we think the risk of error substantially reduced." *Goss* v. *Lopez*, *supra*, 419 U.S. at 583-84. Accord, e.g., *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, 341 U.S. at 171-72 (Frankfurter, J., concurring). The availability of some meaningful opportunity for an employee to be heard before he is discharged would therefore lower the risk of erroneous deprivation that is inherent in the summary discharge procedures followed here. And the prevention of erroneous deprivations, even those which are temporary, is a central purpose of due process:

> *If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented.* At a later hearing, an individual's [salary] can be returned to him if [it was] unfairly or mistakenly [withheld] in the first place. . . . But no later hearing . . . can undo the fact that the arbitary [deprivation] that was subject to the right of procedural due process has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Stanley* v. *Illinois*, 405 U.S. 645, 647.

Fuentes v. *Shevin*, *supra*, 407 U.S. at 81-82 (emphasis added).

But a pre-discharge hearing has value beyond merely preventing a wrongful discharge that would later be overturned; by its very nature and timing, a pre-discharge hearing can prevent an erroneous deprivation that might *not* be later corrected through post-deprivation process. Thus, as this Court recognized in *Armstrong* v.

Manzo, 380 U.S. 545 (1965), post-deprivation process, no matter how complete, may nonetheless fail to provide all the process that is due if a person is denied a pre-deprivation opportunity to be heard.

In *Armstrong* v. *Manzo*, the petitioner's natural daughter had been adopted by her stepfather through the entry of a judicial adoption decree, thereby extinguishing all legal relationship between Armstrong and his daughter. Armstrong first learned of the adoption after the decree had been entered, and then sought to set it aside on the ground, *inter alia*, that he had not been given notice or a hearing before his legal relationship with his daughter had been severed. The Texas courts rejected Armstrong's due process challenge as he had been afforded a subsequent hearing on his motion to set aside the adoption decree. This Court reversed, reasoning that if Armstrong had been afforded notice and a hearing *before* the adoption decree had been entered, he might have prevented the adoption, even if he was unable to set it aside after the fact. 380 U.S. at 551. The Court concluded that because Armstrong had been denied any pre-deprivation process, he had been denied "[a] fundamental requirement of due process"—" 'the opportunity to be heard' . . . at a meaningful time and in a meaningful manner." *Id.* at 552 (quoting *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914)).

The procedures followed by petitioners here, providing only a post-discharge hearing, are similarly deficient. Under those procedures, as in *Armstrong* v. *Manzo*, a public employee may be unable at a post-deprivation hearing to set aside a discharge that, had the employee been given an opportunity to be heard before the discharge, he might have prevented.

Under Ohio Revised Code § 124.34, as under most statutes allowing discharge for "cause," the employer retains broad discretion to decide in the first instance whether an employee's alleged actions warrant discharge or some lesser form of discipline. Yet the absence of any pre-

deprivation process denies an employee the opportunity to be heard at the only time when he can effectively appeal to his employer's discretion—*before* the discharge is announced. A post-discharge hearing, of course, can reverse those discharges that are legally impermissible. But in the vast body of cases where a discharge is permissible but might not be imposed by an employer possessed of all the facts, a post-discharge hearing gives the employee no opportunity to invoke his employer's discretion as to whether, under all the circumstances, a discharge should be imposed. And, as this Court has recognized, the denial of an opportunity to be heard before the State exercises its discretion to deprive an individual of a protected interest is a denial of due process. E.g., *Goss* v. *Lopez*, *supra*, 419 U.S. at 583-84; *Gagnon* v. *Scarpelli*, 411 U.S. 778, 784-86 (1973); *Morrissey* v. *Brewer*, 408 U.S. 471, 479-80, 487-88 (1972).[11]

Moreover, by the very timing of a post-deprivation hearing, the scales may be tipped against the employee. The problem arises in two different contexts. As is often

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[11] In *Codd* v. *Velger*, 429 U.S. 624 (1977), a former employee who had no property interest in continued employment complained that he had been denied a hearing at which he might clear his name, and thereby prevent a deprivation of a liberty interest. See *Bishop* v. *Wood*, 426 U.S. 341 (1976). The Court held that no hearing was necessary as there was no "factual dispute between [the] employer and [the] discharged employee [with] significant bearing on the employee's reputation." 429 U.S. at 627. In so ruling, the Court distinguished *Morrissey* v. *Brewer*, *supra*, and *Gagnon* v. *Scarpelli*, *supra*; in each of those cases, as here, the deprivation a protected interest depended not only on the proper resolution of factual disputes, but also on the informed exercise of discretion. Since Velger's case presented neither a dispute of fact nor a need to exercise informed discretion—Velger had already been dismissed and "had no Fourteenth Amendment property interest in continued employment," *id.* at 628—a hearing would have served no purpose there. The analysis of *Codd* v. *Velger* thus supports our argument here, that due process requires an employee be given an opportunity to be heard where, in considering the deprivation of a protected interest, there is either a factual dispute *or* a need to exercise informed discretion. *Id.* at 627-28.

the case for public school teachers, the employing agency (e.g., the board of education) may itself be the decisionmaker in a post-deprivation hearing. In those circumstances, an employee who seeks to overturn a discharge necessarily starts from far behind, for he is asking nothing less than that the agency saddle itself with double costs—the backpay for the improperly discharged employee and the salary that has already been paid for someone else to do the employee's job in his absence. In a fashion not unlike the altered burden of proof that accompanied the post-deprivation process in *Armstrong* v. *Manzo*, the potential effect of the agency's ruling on its own finances "'may be decisive of the outcome.'" 380 U.S. at 551 (quoting *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958)). Because of the potential impact of its decision on the agency's budget, the employing agency may be tempted to rule against the employee or to deny him full make-whole relief. Cf. *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972) (Mayor's imposition of $50 traffic fines invalid where fines are paid to village treasury).

In other cases, as here, the post-deprivation hearing may be held before an independent tribunal. While less obvious a concern, the effect may well be the same. Even though the tribunal's own budget will not be affected by a ruling in the employee's favor, the decisionmakers are aware that a ruling for the employee would impose double costs on the employing agency. Because of the potential impact on the public fisc, the tribunal may thus be inclined to rule in favor of the employing agency or to grant the employee less than full relief. To be sure, the costs of the decision on a financially burdened local government may only sway an independent decisionmaker in a close case; yet it is in just such a close case that the provision of some pre-deprivation process might have prevented an erroneous discharge in the first instance.

In each of these fashions, therefore, the provision of some opportunity to be heard before discharge may lower

"the risk of an erroneous deprivation of [an employee's property] interest," *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 335—an erroneous deprivation which may or may not be later corrected through Ohio's post-deprivation process.

C. *Government Interest.* The final factor to be considered in the *Mathews* v. *Eldridge* balance is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." 424 U.S. at 335. While "[t]he prospect of imposing elaborate hearing requirements" as a constitutional prerequisite to the discharge of a public employee might be "viewed with great concern," *Goss* v. *Lopez*, *supra*, 419 U.S. at 580, that prospect is not at issue here. Rather, the issue is whether Ohio has a significant interest in denying an employee any opportunity to be heard before his discharge. In contrast to the serious loss that often accompanies the discharge of a public employee, see pages 16-20 *supra*, an employing agency has no significant interest in totally silencing an employee before discharge.

Under Ohio Revised Code § 124.34, a public employee is entitled to a "copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor." No significant administrative burden would be added by giving this statement of reasons before discharge and also affording an employee a meaningful opportunity to "tell his side of the story in order to make sure that an injustice is not done." *Goss* v. *Lopez*, *supra*, 419 U.S. at 580. See also *Memphis Light, Gas & Water Division* v. *Craft*, *supra*, 436 U.S. at 18-19. While the issue of the exact content of pre-discharge process is not before the Court, we do not perceive that a meaningful opportunity to respond, either orally or in writing, after being informed of the reasons for the proposed discharge, would unduly impose additional costs or delay a warranted discharge. Unlike the possible costs

associated with additional procedures in *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 342, 347, where a multitude of benefit decisions are implicated each year, the requirement of notice and an opportunity to be heard before a tenured public employee is discharged does not affect a large number of administrative decisions and does not require the prolonged payment of undeserved benefits. Cf. *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 193-96 (White, J., concurring in part and dissenting in part). And the government, as much as the employee, is the beneficiary when an erroneous deprivation is avoided through the use of pre-deprivation process. Indeed, the federal government, recognizing the substantial benefits and limited costs of pre-discharge process, guarantees its employees a statement of reasons and an opportunity to be heard before discharge. 5 U.S.C. § 7513. Petitioners have given no reason why meaningful pre-discharge process cannot be afforded here.

In the end, we return to the starting point of our analysis in this part of our brief: the constitutional requirement of an opportunity to be heard before an individual is deprived of a protected interest does not depend on the balancing of factors relevant to the form of that hearing. See pages 15-16 *supra*. But, as we have shown, even if that balancing approach were applied, the established requirement that a public employee be afforded an opportunity to be heard before discharge would be confirmed. A public employee confronting a possible discharge has a significant interest, not only in avoiding a delay in the receipt of income, but in avoiding the non-monetary costs of discharge and retaining the opportunity to invoke his employer's discretion. And pre-discharge procedures, while imposing little burden on the government, can effectively inform the employer's discharge decision and prevent discharges that post-deprivation process may or may not later correct.

CONCLUSION

For the foregoing reasons, the judgment below, holding that the denial of pre-deprivation process was unconstitutional, should be affirmed.

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